United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

[redacted] BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

629

No. 22,270

DOROTHY H. ROSSI,

Appellant

v.

EARL A. FLETCHER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM D. DONNELLY
919 Eighteenth Street, N. W.
Washington, D. C. 20006
Counsel for Appellant

INDEX

CITATIONS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,270

DOROTHY H. ROSSI,

Appellant,

v.

EARL A. FLETCHER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether, as appellant contends, the questioned will is invalid because the testatrix was not "capable of executing a valid deed or contract" within the meaning of that requirement of the testamentary law of the District of Columbia where she was, at the time of execution of the will the ward of a conservator appointed by order of Court entered after report and hearing on her petition, which petition had also been recorded in the office of the Recorder of Deeds and where the conservatorship law provides that if, after the filing in Court, the additional step is taken of filing the petition for record in the office of the Recorder of Deeds, and a conservator is appointed

> all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before termination of the conservatorship are void.?

This pending case has not previously been before this Court.

STATUTES INVOLVED

At the time of execution of the will here in question, August 31, 1963, the D. C. Code (1961) provided as follows:

Sec. 19-101. CAPACITY TO MAKE A WILL

> No will, testament, or codicil shall be good and effectual for any purpose whatever unless the person making the same be, if a male, of the full age of twenty-one years, and if a female, of the full age of eighteen years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract.

Lis pendens

> 21-507. Upon the filing of a petition under this chapter /15--Conservators/, a certified copy of the petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator is appointed on the petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void.
> (Emphasis supplied.)

After execution of the will in question and before the death of decedent June 20, 1967, the above sections were amended in form, but without change in substance, codified and re-enacted as part of a single Act, P.L. 89-183, Act of September 14, 1965, 79 Stat. 685, effective January 1, 1966 (D. C. Code (1967)):

Sec. 18-102. CAPACITY TO MAKE A WILL

A will, testament or codicil is not valid for any purpose unless the person making it is:

(1) if a male, at least 21 years of age; or

(2) if a female, at least 18 years of age--and, at the time of executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract.

Sec. 21-1507.

Upon the filing of a petition under this chapter, a certified copy of the petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator is appointed on the petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing, and before the termination of the conservatorship shall be void.

STATEMENT

No question of fact is involved; decision on this appeal turns upon a pure question of law--interpretation and application of the District of Columbia Code provisions relating to testamentary capacity and to disability of wards under conservatorship.

Nature of the case.

In July, 1967, the appellee, Earl A. Fletcher, filed his petition for probate and for letters testamentary as executor nominated in a purported will dated August 31, 1963, of Mollie Roberts McGilton, deceased June 20, 1967 (JA 1, 12, 13, 2, 7). Appellant, Dorothy H. Rossi, filed a complaint caveating the will on the ground, among others, that the will was of no effect because the decedent was, as a matter of law, not "capable of executing a valid deed or contract," an indispensable requirement of the testamentary law (D.C. Code (1961) Sec. 19-101) (JA 2, 3). The complaint shows that at the time of execution of the will the decedent was, as a matter of law incapable of executing a valid contract or transfer of real or personal property, i.e., at the time of execution of the will all "contracts . . . and all transfers of real

and personal property" made by the decedent were "void" under the specific language of the conservatorship statute, in that Mollie Roberts McGilton, the purported testatrix, was a ward under a conservatorship earlier ordered on her petition filed in the United States District Court for the District of Columbia and, prior to execution of the will, also filed for record in the Office of the Recorder of Deeds. In substance, all of the pertinent facts were admitted by the answer (JA 7).

Proceedings and disposition below.

The District Court (Hart, J.) denied appellant Rossi's motion for summary judgment, without opinion (JA 1). After trial on the merits, where the same contention was made by appellant Rossi, the trial court entered judgment for the defendant appellee, Fletcher. The Court made findings of fact and conclusions of law (JA 9, 13). On the issue here involved, it found as a fact that the decedent "possessed the requisite testamentary capacity to execute a will" (JA 12-13). It concluded as a matter of law: "The provisions of D. C. Code Section 21-507 (21-1507) do not render the will in question here invalid as a matter of law" (JA 13). There was no opinion or other indication of the ground of decision.

Jurisdiction.

Judgment in the District Court was entered July 3, 1968, and notice of appeal was timely filed August 1, 1968 (JA 1). The appellate jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

Relevant facts.

The facts pertinent on the issue presented are set forth in the complaint, admitted in the answer and substantially all included in the findings of fact made by the Court.

Plaintiff-appellant Rossi is a niece and next-of-kin of the decedent, Mollie Roberts McGilton. The defendant-appellee, Earl A. Fletcher, is a nephew and next-of-kin of the same decedent; he is nominated executor in the will of Mollie Roberts McGilton dated August 31, 1963, which he offered for probate after her death on June 20, 1967 (JA 9, 12, 14).

The chronology of events is important:

March 14, 1963, the petition of Mollie McGilton, the decedent, for appointment of a conservator for herself was filed in the United States District Court and Francis L. Young, Jr., Esq., a member of the bar, was appointed guardian ad litem (JA 11). The petition had been prepared by a lawyer at the behest of appellant Rossi (JA 10-11).

April 8, 1963, as guardian ad litem, Young filed his report recommending appointment of a conservator (JA 11).

April 22, 1963, Order entered appointing Francis L. Young Jr., Esq., conservator of the estate of Mollie McGilton (JA 11).

June 6, 1963, the conservator, Young, filed a certified copy of the petition for conservator for record in the Office of the Recorder of Deeds for the District of Columbia under D. C. Code (1961) Sec. 21-507 (JA 3, 7).

July 11, 1963, the conservator Young filed his petition for order authorizing disbursements made in obtaining certified copy and for fee for filing for record in the Office of the Recorder of Deeds for the District of Columbia (JA 11).

August 31, 1963, Mollie Roberts McGilton executed the will here offered for probate and made the subject of the caveat proceeding (JA 12). This will had been drafted by the conservator, Young, and it was witnessed by him and one James Treese, another member of the bar (JA 12).

June 20, 1967, Mollie Roberts McGilton died, having been admitted to St. Elizabeths in March, 1966 (JA 13).

The conservatorship commenced April 22, 1963, continued until the death of Mollie McGilton (JA 11, 2, 7).

In June, 1967, the will of August 31, 1963, was filed

for probate with the affidavits, in regular form, of the witnesses, Young and Treese (JA 1, 12).

July 3, 1967, Earl Fletcher, the appellee, filed his petition for probate of the will of August 31, 1963, and for letters testamentary to him as nominated executor. His attorney on the petition was Francis L. Young, Jr., Esq., the conservator who had recorded in the Office of the Recorder of Deeds the petition for conservatorship (JA 2, 7).

September 25, 1967, Dorothy Rossi, the appellant, filed her complaint in caveat of the proffered will (JA 1). This complaint was later amended in respects immaterial here. The complaint was grounded principally on the provision of the testamentary capacity statute of the District and on the provisions of the conservatorship statute. It asserted that, order for conservator having been entered, and certified copy of the petition for conservator having been recorded in the Office of the Recorder of Deeds on June 6, 1963, Mollie McGilton was, at the time of executing the proffered will on August 31, 1963, not "capable of executing a valid deed or contract" (JA 3). For, at that time, Mollie McGilton, was a ward under a conservator and she was, regardless of her actual mental condition, incapacitated by the specific provision of the conservatorship statute (D.C. Code (1961) Sec. 21-507:

> . . . all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing /for record in the Office of the Recorder of Deeds/ and before the termination of the conservatorship are void. (Emphasis supplied.)

The complaint asserted that since, at the time of execution of the will, any contract or transfer of property by the decedent-testatrix was or would have been "void," she was not "capable pf executing a valid deed or contract" within the requirement of the testamentary capacity statute (herein after, for brevity, called "the will statute") (JA 3).

Rossi moved for summary judgment on the ground set forth in her complaint (JA 1) but her motion was dismissed by Hart, J. (JA 1).

At a jury-waived trial, the parties introduced evidence that extended to issues of mental capacity and undue influence that are not here (JA 9). After trial, the Court below made findings of fact and conclusions of law (JA 9, 13). On the issue here presented, the findings included (JA 12-13):

> 19. The Court finds as a fact . . . that at time of the execution of the August 31, 1963 will, the will in question here, that Mollie Roberts McGilton possessed the requisite testamentary capacity to execute a will.

And the Court concluded as a matter of law (JA 13):

> 1. The provisions of D. C. Code Section 21507 (21-1507) do not render the will in question here invalid as a matter of law.

ARGUMENT

The Court below erred in holding, as a matter of law, that the conservator statute of the District of Columbia has no application (JA 13).

There appears to be no question as to the validity of the conclusion that the undisputed facts brought into operation, as to Mollie McGilton, commencing with a date prior to, and continuing through, the date of execution of the will of Mollie McGilton, the provision of the conservator statute--

> . . . all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void.

Hence, it is not disputed that as of the date of execution of the questioned will "all contracts, except for necessaries, and all transfers of real and personal property" made by Mollie McGilton were "void."

The conclusion of law by the Court below that D. C. Code (1961) Section 21-507, the conservatorship statute, does not render the will in question invalid is erroneous for two independent and alternate reasons:

1. A will is a type of "transfer of real and personal property" made "void" by the terms of the conservator statute standing alone.

2. The wills statute (D. C. Code (1961) Sec. 19-101), requires, not only that the testator, at time of execution, be possessed of the necessary mental capacity to execute a valid deed or contract, but, as well, be not disabled from making a valid deed or contract for any other reason.

I

THE CONSERVATORSHIP STATUTE IS REMEDIAL AND RECORDATION THEREUNDER MADE THE WILL IN QUESTION VOID

The conservatorship statute (Act of October 24, 1951, c. 545, 65 Stat. 608) was plainly remedial in nature. In brief, and as codified, it provided in substance as follows (D. C. Code (1961) Title 21, Chapter 5.--Conservators):

Section 21-501 authorizes appointment of a conservator by the District Court--

> If an adult person residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity properly to care for his property. . . .

Section 21-502 prescribes the requisite allegations of the petition, provides for notice, authorizes appointment of a guardian ad litem, and directs appointment of a conservator upon a finding that the prospective ward "is incapable of caring for his property."

Section 21-503 outlines the powers of the conservator, including "control of the estate, real and personal, of the person for whom he has been appointed."

Section 21-504 provides that when a person for whom conservator has been appointed "becomes competent to manage his

property" he may apply to the Court for discharge of the conservator and restoration to the care and control of his property. If the Court finds him competent, an order for such restoration is required to be entered.

Section 21-505 provides for appointment of a temporary conservator, with or without notice, if found necessary for protection of the estate.

Section 21-506 directs that the Court, in its discretion, may appoint the conservator, or another, to be responsible for the personal welfare of the person whose property is under conservatorship.

Section 21-507, the last section, is the section with which we are most particularly concerned:

> Sec. 21-507. Lis pendens.
>
> Lis pendens: Upon the filing of a petition under this chapter, a certified copy of such petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator be appointed on such petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after such filing and before the termination of the conservatorship shall be void.

A. The undisputed facts establish that, as of the date of execution of the questioned will, all contracts and all transfers of real or personal property by Mollie McGilton were void.

As appears from the chronology in the Statement (supra, p. 6), and from the Findings of Fact by the Court (JA 9), the petition for appointment of a conservator signed by the decedent (but prepared at the behest of the plaintiff, Dorothy Rossi) was filed in the District Court on March 14, 1963 (JA 11). On his report filed as guardian ad litem, and after hearing, Francis L. Young, Jr., Esq., was appointed on the petition, as conservator April 22, 1963 (JA 11). This vested him with control of the estate of Mollie McGilton (D. C. Code (1961) Sec. 21-503). But about 45 days after his appointment, the conservator, of his own motion, took a second step under the statute. Without notice to anyone, none being required, the conservator filed a copy of the petition for appointment of a conservator for record in the Office of the Recorder of Deeds, on June 6, 1963 (JA 11).[1/] This filing for record in accordance with Sec. 21-507 quoted above, the order appointing the conservator on the petition having been already entered, brought into full operation and effect from and after June 6, 1963, the provision in that section:

1/ The Findings of Fact omit the precise date of the filing for record in the office of the Recorder of Deeds (Fg. 15, JA 11). The actual date, June 6, 1963, is alleged in the compliant ard admitted in the Answer (Compl., para. 6; Answer, 2nd Defense, para. 3 (JA 3, 7)). Counsel for the appellee has authorized this statement that he stipulates the correctness of the date June 6, 1963.

> . . . all contracts, except for necessaries, and all transfers of real and personal property made by the ward after such filing and before the termination of the conservatorship shall be void.

The Answer admits, but the Court did not find, that the conservatorship did not terminate until the death of Mollie McGilton June 20, 1967 (Answer, 2d Defense, para. 3).

The will here in question was not executed until August 31, 1963 (JA 12) and was thus executed during the period when "all transfers of real and personal property" by the decedent were rendered void.

B. <u>The questioned will is "void" as a "transfer of . . . property" within the voiding provision of the statute that declares "all transfers of real and personal property" void</u>.

Appellee Fletcher contends, and the Court below impliedly held, that the voiding effect of the conservator statute on "transfers of real and personal property" does not embrace a will.

1. <u>This Court has earlier ruled that "conveyance" equates with "transfer" and that "transfer" includes a devise or will</u>.

In <u>Freitag</u> v. <u>Freitag</u>, 47 App. D.C. 1 (1917), the validity of a will was challenged on the ground, among others, that the decedent testator was not a citizen. The executor

relied on a 1905 statute making applicable to the District of Columbia a prior 1897 statute authorizing any alien holding title to lands in any of the territories to "convey his title thereto." The reasoning of this Court is important. It held (pp. 3-4):

> The word 'convey' means, 'to transfer the title to or of, as real estate.' (Stand. Dict.; Burrell's Law Dict. 281; Bl. Com. 294.) To devise property is to convey it. Therefore, Henry C. Freitag, whether alien or citizen, had the power, at the time the purported will was made, to dispose of his property by will.

While this statement of reasoning falls short of a classic syllogism, it is nevertheless clear that a devise or will is held valid under the authority to "convey" only because a devise or will is held to be within the broadly descriptive word "transfer." "The word 'transfer' has a still wider meaning. It includes all translations whereby property of one person becomes the property of another, whether by descent or purchase, and a will is a common assurance of a transfer which becomes effective at the death of the testator. 2 Blackstone, Com. 294." Elwood v. State Soldiers Compensation Board, 232 P. 1049, 117 Kan. 753 (1925). "In passing, it might also be said that the word 'transfer' is one of general meaning and may include the occasion of giving property by will." Hayter v. Fern Lake Fishing Club, (Tex. Civ. App.)

318 S.W. 2d 912, 915 (1958). A whole chapter is devoted to "Transfers by Will" in Tiffany on Real Property (1912), c. 20.

2. The legislative history of the statute requires that "transfers" be read to include "wills."

The history of this statute is important in that it shows that a committee of the judges, particularly Judge Schweinhaut, of the District Court were active in urging its enactment and that Judge Schweinhaut made much of an actual and shocking example of the improvident will of a senile woman as typifying at least one of the evils against which the legislation was intended to protect. The legislation history further shows that section 7 (D. C. Code (1961) Sec. 21-507) here involved was first introduced by an amendment made on the floor of the House after passage in the Senate, and that the sponsor of the amendment made it emphatically clear to the House that "void" as used in the law means "void," not voidable.

The bill that became the law, S. 11, 82d Cong., as introduced by Senator McCarran, was introduced on January 8, 1951, and the same day referred to the Senate Committee on the District of Columbia (97 Cong. Rec. 86). The antecedent of the bill is described in an unsigned copy of a letter from the District of Columbia Commissioners dated February 13, 1951,

found in the materials of the House Committee of the District of Columbia, and in pertinent part reading as follows:

> Honorable Matthew M. Neely
> Chairman, Committee on the District of Columbia
> United States Senate
> Washington, D. C.
>
> My dear Senator Neely:
>
> The Commissioners have for report S. 11, 82d Congress, entitled a bill 'to provide for the appointment of committees to conserve the assets of persons of advanced age,mental weakness, or physical incapacity.'
>
> . . . . . .
>
> An identical bill was introduced in the 81st Congress, 1st session, as S. 1113 entitled a bill 'to provide for the appointment of committees to conserve the assets of persons of advanced age, mental weakness or physical incapacity.' Following conferences between the judges of the United States District Court for the District of Columbia, representatives of the bar association of the District of Columbia, and counsel for the Senate District Committee, amendments to S. 1113 were agreed upon. The bill was reported out favoribly (Senate Report No. 2559) on September 13, 1950, and passed by the Senate with the following amendments:
>
> Strike out all after the enacting clause and in lieu thereof insert the following:
>
> 'Section 6. Where a conservator is appointed pursuant to the provisions of this Act, all contracts and business transactions subsequent to the filing of the petition, of a person for whom a conservator has been appointed hereunder, shall be presumed to be a fraud upon him and against his rights and interests.
>
> 'Amend the title to read as follows:

'A Bill to provide for the appointment of conservators to conserve the assets of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity.'

S. 1113 as reported out by the Committee had the approval of the Commissioners and passed the Senate on December 15, 1950.

The Commissioners recommend that S. 11, if amended to conform with S. 1113, as reported out and passed in the 81st Congress, do pass.

The Commissioners have been advised by the Bureau of the Budget that there is no objection on the part of that office to the submission of this report to the Congress.

Respectfully,

President, Board of
Commissioners, D. C.

On March 14, 1951, the Senate Committee on the District of Columbia reported back on S. 11 with recommendation (in accord with the Commissioners' letter) to strike out everything but the enacting clause and insert a competely new committee draft (97 Cong. Rec. 2363; S. Rept. No. 171, 82nd Cong., 1st sess.). See Committee Draft, S. 11 (App'x., pp. 4-7).

The Senate, on April 11, 1951, agreed to the committee amendments and passed the bill as amended in committee (97 Cong. Rec. 3625).

In the House the bill, on April 12, 1951, was referred to the House Committee on the District of Columbia. Judge Schweinhaut then wrote a letter to the House Committee on the District of Columbia, as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

June 2, 1951

Dear Mr. McLeod:

This letter is pursuant to our telephone conversation on yesterday concerning S. 11 which passed the Senate on April 11 and is now in the House District Committee. Hence, I think it unnecessary to review the history of the proposed legislation. The purpose of this letter, therefore, is to urge the immediate passage of the bill in the House, if at all possible.

I have just considered and decided a case, the disclosures in which cause me to believe that what has always been desirable legislation is actually immediately imperative for the protection of people who cannot manage their own affairs but who are not of unsound mind. The facts in brief are these. A woman, now 88 years old, is under the absolute domination of a man who has been a roomer in her house for some fifteen years. He has obtained most of her cash, has had her execute a power of attorney giving him complete authority to handle her property, has had her make a will leaving everything to him (which also forgives him an indebtedness to her of $5,500) and has tried to put the finishing touch on by marrying her. That, it seems, has been prevented so far because the priest who visits her regularly has refused to perform the ceremony. Several years ago she made a deed to the house she owns to her niece. This to protect the niece against the day when the old woman could no longer handle her own affairs. This deed was destroyed by the roomer but about 3 years ago she told her physician (for 20 years) she wanted the niece to have the property

and couldn't the doctor do something about it. He informed the niece, the deed was prepared, executed and delivered. When the roomer found out about it some months later he got a lawyer and filed a suit for the old woman to have the deed set aside as fraudulent. That is why the matter came before me and she is now protected only to the extent that during her lifetime her house cannot be sold from under her. The niece had seen to it that the life estate was retained.

In about 1950, a mental health proceeding was instituted by her sister (mother of the niece who was the defendant in the case I had). That was abortive. She was adjudicated by the Court to be of unsound mind, a jury trial was demanded and the jury held that she was not of unsound mind. That is the expected result in such situations because of the natural and understandable reluctance of a jury to hold 'insane' a person who is just senile. At present, there is no alternative. You're insane or you're sane.

And so we have the situation that her only relatives, a sister, two nieces and a nephew are effectively barred from protecting her property or her person solely because of the absence of statutory authority to enable our court to do anything about it; or any other court, for that matter since no one can remove him from her home except herself and she is incapable of doing so.

If this bill could be passed promptly, it would be possible to afford a complete solution to the several problems which are involved in this particular case and enable us to deal with many similar situations which now and always will exist.

I would deeply appreciate it if you would pass this information on to Congressman McMillan. You might say, too, that while the judges of our court do not take official position on the bill since it does not directly affect the court itself, I'm sure I speak for all of them as individuals.

Very truly yours,

s/ H. A. Schweinhaut

William N. McLeod
House District Committee
Room 445, Old House Office Building
Washington, D. C. 2/

One of the specific targets of the legislation, in the mind of Judge Schweinhaut at least, is thus shown to have been the avoidance of a will of a senile woman who could not be shown to be of unsound mind.

The House Committee reported the Senate bill back without amendment (H. Rept. No. 631, 82d Cong., 1st sess.; 97 Cong. Rec. 3806, 6840).

When the bill was called up for consideration by the House as Committee of the Whole, Mr. Harris of Arkansas explained the reasons for the legislation. His statement, in pertinent part, shows that the danger of improvident disposition by will had been impressed on the minds of those who had read the Schweinhaut letter (97 Cong. Rec. 7077) 3/ :

2/ Found among the original materials of the House Committee on the District of Columbia, in files deposited in the Archives.

3/ The whole of the House debate as reported in the Congressional Record is set out in the Appendix, pp. 8-13.

> This matter was called to the attention of both committees in the House and Senate by one of the judges of the District Court. In fact, he advised that there were a number of situations where some provision should be made whereby some person be appointed to take over and look after the property of the parties under the supervison of the Court.
>
> I might say for the information of the Members of the House that one of the judged of the United States District Court advised us of a case where there was an elderly lady, 88 years old, who was under the absolute domination of a party who had been a roomer in that house for some 15 years. He had obtained most of her cash. He got her to execute a power of attorney giving complete authority to handle her property. He had her make a will leaving eve ything to him, and, in fact, he had a debt of some $5,500 forgiven. Consequently, this lady who has reached this age is about to be dispossesed of all her property. She is mentally incompetent to do anything about it. (Emphasis supplied.)

Mr. O'Hara of Minnesota presented a complete new draft as a substitute, including as section 8 thereof a provision, in lieu of the Judges' section 6, and in substance identical with the language of section 7 of the law as finally enacted in D. C. Code (1961) Sec. 21-507 (97 Cong. Rec. 7077). The title of the O'Hara bill as there set out (App'x., p. 13) also shows intent to protect the ward's family against want by waste of the estate (which, of course, could include improvident disposition by deed or by will, or by contract to make a will). Mr. O'Hara explained (97 Cong. Rec. 7077-7078 (App'x., infra, pp. 9-10)):

Mr. Speaker, this legislation, as has been explained by the gentleman from Arkansas, originated out of the anomalous situation which exists in the District of Columbia that if an individual is not insane or is not a drunkard or a drug addict there is nothing that can be done by the court to protect that individual or to preserve the assets of the individual against waste.

. . . . . .

Many of you have had these rather tragic experiences of dealing in your home States with persons who are in the shadowland between normal and subnormal, yet they are not insane or totally incompetent. They are perhaps incompetent to rightfully manage their property and by reason of some other condition which may exist they are wasting their property or causing a waste of their property and are liable to subject themselves and their loved ones to want . . . (Emphasis supplied.)

The O'Hara draft radically changed the provisions originally suggested by the judges, incorporated in the bill as passed by the Senate as sec. 6 (supra, p. 18), and merely setting up a presumption of fraud. Referring to section 8 of his proposed amending draft bill (97 Cong. Rec. 7076), corresponding at that time to section 7 (the lis pendens or transfer-voiding section here involved) Congressman O'Hara said (97 Cong. Rec. 7078, bot. 3d col., App'x., infra, p. 10):

> One other feature I have provided in here, which I think took care of a rather obnoxious provision in the original bill, relates to the filing of a lis pendens which is oftentimes necessary. In my practice I had such an occasion where a man by reason of drunkenness was wasting his property and

> subjecting his family to want. Some sharpshooters were trying to get him to dispose of his property.[4/] He happened to be a widower. There is a provision in my own State that you may file such a petition, and file a copy of such in the register of deeds office, and it can be indexed against the property. It is immediately notice to anyone attempting to deal with the individual that he is under question as being a competent person. That, of course, would amount to public notice to anyone so attempting to take advantage of such an individual. (Emphasis supplied.)

On questioning by Mr. Harris of Arkansas, Mr. O'Hara emphasized (97 Cong. Rec. 7080, App'x., infra, p. 12):

> . . . if a guardian be appointed on such petition, all contracts except for necessaries and all transfers of real and personal property made by the ward after such filing and before the termination of the guardianship shall be void. I make them absolutely void; they are not voidable; they are void. (Emphasis supplied.)

The O'Hara amendmentpassed the House (97 Cong. Rec. 7081; App'x., infra, p. 13). The Senate disagreed, asked for a conference and conferees were appointed (97 Cong. Rec. 8505). The House insisted on its amendments and agreed to a conference; conferees were appointed (97 Cong. Rec. 9353).

The conference report (97 Cong. Rec. 1026, 82d Cong., 1st sess.; App'x., pp. 14, 17) includes a statement on the part

---

4/ Admittedly, transfers by will are most frequently referred to as "dispositions" of property by will. Coupled with the fact that he expressly noted the absence of a spouse, the use by Congressman O'Hara of "dispose of his property," fortifies the inference that he was here talking about a disposition by will.

of the managers for the House that emphasizes the change in the section of the bill here involved:

> The conference substitute embodies section 8 of the House amendment, which provided that all contracts (except for necessaries) and property transfers made by an individual under conservatorship shall be void. The corresponding section of the Senate bill provided only that contracts and business transactions of any such individual shall be presumed to be a fraud upon the conservator.

The explanation by Senator Pastore, one of the Senate managers, ordered printed in the Congressional Record, clearly gives to the voiding provision of section 7 a scope broad enough to include an ambulatory will. His statement, in pertinent part, was (97 Cong. Rec. 13216):

> . . . It gives the court power to order the Conservator to be responsible for the personal welfare of such person as well as his property, and makes any transaction by the incompetent after filing of a petition void. (Emphasis supplied.)

The Conference Report was agreed to by the House (97 Cong. Rec. 12266) and by the Senate (97 Cong. Rec. 13216); was signed by the Speaker and the President Pro Tem of the Senate (97 Cong. Rec. 13320, 13405); it was approved and signed by the President as P.L. 196 October 24, 1951 (97 Cong. Rec. 13732).

A will is plainly a "transfer" of property even though it becomes effective only upon death. If the Court deems the term to be ambiguous, as used in the statute for

conservatorships, it is nevertheless required to give primary weight to the remedial nature of the statute and to construe the provision liberally so as to fulfill the whole legislative purpose of the enactment. Alexander Bryant Co. v. New York Steam Fitting Co., 235 U.S. 327, 339; State Farm & Casualty Co. v. Tashire, 386 U.S. 523, 533.

Under the circumstances of the instant case, the conservatorship statute, standing alone, and without aid of any other statute, by its express terms renders the will here in question void.

II

UNDER THE DISTRICT OF COLUMBIA STATUTE AS TO TESTAMENTARY CAPACITY THE WILL IN QUESTION IS NOT GOOD FOR ANY PURPOSE

The D. C. Code (1961), Sec. 19-101 (D. C. Code (1967), Sec. 18-102) in pertinent part provides:

> No will . . . shall be good and effectual for any purpose whatever unless the person making the same . . . be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract. (Emphasis supplied.)

Here, the conservatorship statute plainly made the decedent, Mollie McGilton, not "capable of executing a valid deed or contract." By its terms, and on the facts, "all contracts, except for necessaries,[5/] and all transfers of real and personal property" made by her were, as of the time of execution of the proposed will "void." It should be unnecessary to argue that this made her "not capable of executing a valid deed or contract." Certainly this is so if the Court gives effect to the plain and unambiguous language of each of the two statutes.

5/ This exception manifestly irrelevant here. A contract for necessaries is defined, not as a "valid contract," but on the theory of "quasi-contract" and only for the reasonable value of the necessaries furnished. 2 Williston on Contracts (3rd ed.) Sec. 240, pp. 49-50; Sec. 255, pp. 91-92; Sec. 270 A, pp. 149-150.

No occasion is presented for reading them together to eliminate conflicts. Each, standing alone, need be given only the literal intent of its own plain words. The ordinary and received meaning of the language is clear, and the intention of each statute is plain. There is no room for attempts to construe away the plain language. Construction of a statute to ascertain legislative intent is resorted to only where the language is ambiguous, or where its plain meaning would lead to an absurd consequence. Whelan V. Welch, 50 App. D.C. 173, 176, 269 Fed. 689 (1921); Robertson v. United States ex rel. Baff, 52 App. D.C. 177, 181, 285 Fed. 911 (1922); Coombe v. United States ex rel. Selis, 55 App. D.C. 190, 191, 3 F. 2d 714 (1925); District of Columbia Nat Bank v. District of Columbia, 121 U.S. App. D.C. 196, 198, 348 F. 2d 808 (1965). Rules of construction are never used to create ambiguity and doubt. Wilbur v. United States ex rel. Wold Co., 58 App. D. C. 347, 348, 30 F.2d 871 (1929).

The appellee, Fletcher, nevertheless, pitches his argument on the assertion that the requirement of the wills statute ("capable of executing a valid deed or contract") does not mean what it says--that this furnishes merely an added standard for determining whether the other test of the wills statute ("of sound and disposing mind") is satisfied. We concede that the "capable" clause is frequently so used and do not

deny the propriety of so using it. Stewart v. Elliott, 2 Mackey (13 D.C.) 307, 318 (1883); Barbour v. Moore, 4 App. D.C. 535, 547 (1894). Appellee Fletcher, however, goes fartherand urges that this is the only meaning of the "capable" clause.

Fletcher below argued a number of decisions of other jurisdictions that lack of capacity to make a contract does not necessarily demonstrate lack of testamentary power. But the statutory law of none of these contained the requirement that the testator be "capable of executing a valid deed or contract." This provision is peculiar to the statute of the District of Columbia and the statute of Maryland from which the District statute was originally drawn. In this aspect, the testamentary law of the two jurisdictions is unique. See 1 Page on Wills (1960 ed.) Sec. 12.20, p. 605, note 35.

A. The statutory requirement that the testator be "capable of executing a valid deed or contract" clearly denies testamentary capacity to one whose contracts or deeds are under other law and for reasons not limited to mental infirmity, void.

The history of the testamentary capacity statute of the District establishes that the requirement "capable of executing a valid deed or contract" denies power to make a will to any member of a class which, for reasons other than natural

infirmity and without regard to soundness of mind, is for reasons of established or legislative policy denied capacity to make a deed or contract.

The testamentary law of the District of Columbia is derived directly from the testamentary law of Maryland. The Organic Act of 1801 provided (Act of February 27, 1801, sec. 1, 2 Stat. 103, 104-105):

> That the . . . laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District, which was ceded by that State to the United States and by them accepted as aforesaid.

See D. C. Code (1967), Vol. 1, p. xxxv.

The Act of 1801, supra, thus adopted the testamentary law of Maryland (Maryland Act of 1798, c. 101, 2 Kilty's Laws) which was enacted on the last day of the November, 1798 session of the Assembly of Maryland, January 20, 1799, and became effective on June 1, 1799. The Maryland Act is entitled:

> "An Act for Amending and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, the Duties of Executors, Administrators and Guardians, and the Rights of Orphans and Other Representatives of Deceased Persons.

The Act provided:

> Whereas the laws and regulations relative to the estates of deceased persons, comprehend a great variety of subjects, and relate to citizens of every description, not only are become complicated and difficult to be understood, but are found

by experience to be greatly inadequate to the purpose for which they are framed;

II. BE IT ENACTED, By the General Assembly of Maryland, that every provision, rule or regulation, contained in any Act of Assembly heretofore passed, or in any English statute introduced, used or practised under, in this State, which is inconsistent with, or repugnant to, anything contained in this Act, Be and it is hereby repealed and rendered utterly void and of no effect.

III. BE IT ENACTED, that the following rules, orders and regulations, shall be taken, held and considered, in all courts, tribunals and offices, and by all judges, justices and officers in this State, subject to the law of the land.

. . . . . .

3. No will, testament or codicil, shall be good and effective for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract. No will, testament, or codicil, shall be good and effective to pass any interest, or estate in any land, tenement,or incorporeal hereditament unless the person making the same, if a male, be of the full age of 21 years, and if a female, of the full age of 18 years. (Emphasis supplied.)

As enacted by Maryland, the 1798 Act, and adopted as District of Columbia law in 1801, the statute as to testamentary capacity was thus in substance identical with the D. C. Code provision of 1961 and 1967.

"Capable of executing a valid deed or contract" as initially enacted in Maryland was effective to bar persons who were not necessarily disqualified by reason of mental

infirmity. This provision was effective to bar married women from making a will because they were unable to make a valid contract or deed.

At common law the Statute of Wills (32 Hen. VIII (1540)) granting testamentary capacity to all, was modified by the exception as to married women added by the "Bill concerning the Explanation of Wills"(34 & 35 Hen. VIII, c. 5 (1542)) which provided:

> . . . that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person de non sana memory, shall not be taken to be good or effectual in law. (See Allison Reppy, The History of the Law of Wills and Testaments in England, 16 Georgetown L. J. 194, 209, 213, 214).

Women covert were thus barred from making wills at the common law. But as this Court noted in Clawans v. Sheetz, 67 App. D.C. 366, 92 F. 2d 517 (1937) (at pp. 368-369):

> . . . Since 1847 the District has consisted only of that part ceded by Maryland (Act of July 9, 1846, 9 Stat. 35; Phillips v. Payne, 92 U.S. 130, 133, 23 L. Ed. 649). The testamentary law of Maryland (Maryland Act of 1798, ch. 101, Kilty's Laws) became operative in that state on June 1, 1799, and was in force on February 27, 1801 (section 5, ch, 101, Maryland Act of 1798). This court has declared that 'the Maryland Act of 1798 superseded the common law in that State, and became the law of this District,' and that the decisions of the court of thst state have a bearing upon the construction of the District Code, 'inasmuch as our /testamentary/ law was taken largely from that State.' Berry & Whitmore Co. v. Dante (1915), 43

> App. D.C. 110. . . . A comparison of the testamentary law in the Maryland Code of 1888 with the 1901 District Code clearly shows that the testamentary provisions of our Code were largely based thereon and in many instances are almost identical; in addition, most of our Code provisions are substantially similar to provisions of the Maryland Act of 1798. (Emphasis supplied.)

The common law embodying the Statute of Wills and the exception therefrom of married women was thus superseded by the Maryland testamentary act of 1798. The denial to married women of the right to make a will was, however, continued by the provision in the Maryland testamentary law and the District law with which we are here concerned--"capable of executing a valid deed or contract."

This is confirmed by the Report of Chancellor Kilty, 1811, under the direction of the State Government and pursuant to a resolution of the General Assembly (1800). The Report is entitled:

> A Report of All such English Statutes as Existed at the Time of the First Emigration of the People of Maryland, and Which by Experience Have Been Found Applicable to Their Local and other Situations; and of such others as Have Since Been Made in England or Great Britain, and Have Been Introduced, Used and Practised, by the Courts of Law or Equity; and of such Parts of the Same as May be Proper to be Introduced and Incorporated into the Body of the Statute Law of the State.

In this report, under a section headed

> Statutes and Parts of Statutes Found Applicable but Not Proper to be Incorporated (p. 140)

the text states (p. 163):

> 32. Hen. 8 -,A.D. 1540
>
> Chap. 1. The Act of Wills, wards and primer seisin, whereby a man may devise two parts of his land.
>
> The most concise account of the effect of this statute as explained by 34 Hen. 8, Ch. 5, is given in 2 Bl. Comm. 375, to wit: That all persons being seized in fee simple (except feme-coverts, infants, idiots, and persons of non-sane memory) might by will and testament in writing, devise to any other person, but not to bodies corporate, two thirds of their lands, tenements and hereditaments, held in chivalry, and the whole of those held in socage; which by the alteration of tenures by the statute of Charles the Second, amounted to the whole of their landed property, except copyhold tenements.
>
> It is not thought necessary to attempt a more particular description of those statutes, because, although they undoubtedly extended to the province, and continued in force in the state before the testamentary law, it is considered that (supposing them not repealed thereby), it is not necessary or proper that they should be incorporated, &c. in addition to the comprehensive provisions that are made in that law.6/
>
> The 14th section of the statute, 34 Hen. 8 Ch, 5, declared, that wills &c by any woman covert or person within the age of twenty-one years, idiot or person of non-sane memory, should not be taken to be good or evidictive in the law. In the testamentary law, women covert are not by name incapacitated, but in addition to what might be implied from the 1st section. The 3d prescribes that the persons devising shall be capable of making a valid deed or contract, by which they must be considered as excluded. (Emphasis supplied.)

6/ This statement fortifies the correctness of this Court's ruling in Clawans v. Sheetz, supra, p. 33, that the "Maryland Act of 1798 superseded the common law in that State."

It is thus plain that by the direct antecedent of the law here in question, married women were, as a class, deemed excluded from testamentary capacity, not because of mental unsoundness, but because they were not "capable of executing a valid deed or contract." Since the British common law was thus superseded, the clause "capable of executing a valid deed or contract" as included in the Maryland Act of 1798 was essential and rightly regarded as effective to continue in the Maryland testamentary law the same exception as to married women that obtained under the Statute of Wills and the common law. The same clause, from the same source, in the District statute thus has significance and content in addition to the exclusionary effect of the "sound and disposing mind" clause. It was meaningful and effective to deny testamentary capacity in 1798 and 1801--not because of mental infirmity--but purely as a matter of legislative policy, to classes of persons that fell within its scope because lacking in legal power to contract or deed property. In addition to married women [7/] another class so excluded was made up of slaves until the institution was abolished.[8/]

7/ In 1798 and 1801 and for many years thereafter, married women, at common law, had no capacity to make a valid and binding contract. Elliott v. The Lessee of Piersol, 1 Pet. 328, 338; Burton v. Marshall, 4 Gill 487, 403 (Md. 1846);

As to classes of persons other than those mentally disqualified, the testamentary capacity became dormant after women were given the right to contract and the disabilities of slavery disappeared. But this Court recognizes that the full meaning of all parts of a statute is not lost or repealed by desuetude. Here, with the passage of the conservatorship statute in 1951, there was created in law a new class which was under disability, like disabilities of coverture and of slavery, for reasons other than established natural infirmity (cf. 1 Jarman on Wills (6th ed.) p. 52).

Norris v. Lantz, 18 Md. 260, 269 (1862); Nusz v. Grove, 27 Md. 391, 401 (1867); see McElfresh v. Schley, 2 Gill 181, 201 (1844) ("There are cases of void wills such as the will of a feme covert, or of an infant.") Atkinson on Wills (1st ed.) Sec. 71, pp. 179-180; ibid., (2d ed.) Sec. 50, p. 228. In Maryland they were given the independent right to contract and the full right to make a will by statute in 1898. See Md. Code Ann. (1957) Art. 45, Secs. 4-5. In the District of Columbia, when women covert were given limited power to dispose of their property as if femes sole, the statute affirmatively stated they should have power to "convey, devise and bequeath the same." Act of April 10, 1869, c. 23, 16 Stat. 45; Hamilton v. Rathbone, 175 U.S. 414, 416-419; see Zeust v. Staffan, 14 App. D.C. 200, 213, mod. 16 App. D.C. 141, 144 (,900); 1 Jarman On Wills (6th Amer. ed.), pp. 51-52.

8/ Slaves, under the institution of slavery,were incapable of entering into a valid contract. Hall v. United States, 92 U.S. 27, 30 (1876), 23 L. ed. 597, 599; Hall v. Mullin, 5 H. & J. 190, 193 (Md. 1921); Bland v. Dowling, 9 Gill & J. 19, 27 (Md., 1837).

B. Recent codification and re-enactment of the testamentary capacity statute and of the conservatorship statute confirms that they are regarded as part of a comprehensive plan each to be given effect according to its plain language.

Prior to the death of the decedent and with minor revisions as to form, but none as to substance, the wills section and the conservatorship section here involved were revised, codified and re-enacted as parts of a single legislative Act: "Part III of the District of Columbia Code, 'Decedent's Estates and Fiduciary Relations.'" P.L. 89-183, Act of September 14, 1965, 79 Stat. 685, effective January 1, 1966. See Section 1 of the Act, as set forth in 2 D.C. Code (1967), p. 957. It would be a strange and bizarre rule that would hold that each statute is to be read insulated from the other, and as if it did not exist.

CONCLUSION

The conservatorship statute, on the established facts, and by reason of the conservator's recording of the petition for conservatorship after order for his appointment, clearly placed Mollie McGilton under disability to make any contract or make any transfer of real or personal property. Being so disabled by positive law, Mollie McGilton, at the time of

executing the will here in question, was not "capable of executing a valid deed or contract" within the meaning, in law, of that language in the District of Columbia statute as to testamentary capacity. It is therefore, respectfully, submitted that the will in caveat is not good or effectual for any purpose whatsoever and should be held for naught. The conclusions of law of the Court below as to the conservatorship statute is manifestly erroneous as a matter of law and the judgment thereon founded should be reversed and the cause remanded with directions to enter judgment for the appellant on her caveat complaint.

William D. Donnelly
919 Eighteenth Street, N. W.
Washington, D. C., 20006

APPENDIX
TO
BRIEF FOR APPELLANT

Calendar No. 160

82D CONGRESS
1ST SESSION

S. 11

[Report No. 171]

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 1951

Mr. MCCARRAN introduced the following bill; which was read twice and referred to the Committee on the District of Columbia

MARCH 14 (legislative day, MARCH 12), 1951

Reported by Mr. PASTORE, with amendments

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide for the appointment of committees to conserve the assets of persons of advanced age, mental weakness, or physical incapacity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That whenever any person residing in the District of Columbia is unable, by reason of advanced age, mental weakness, or physical incapacity, properly to care for his property the District Court of the United States for the District of Columbia may, upon his petition or upon the petition of one or more of his friends and after notice and hearing as provided in this Act, appoint some fit person to be committee of his estate.~~

SEC. 2. Upon the filing of such petition the court shall fix a time and place for a hearing and shall cause not less than seven days' notice thereof to be given to the person for whom a committee is to be appointed, except that for cause shown the court may direct that a shorter notice be given. No appointment shall be made without such notice as the court may order to the heirs apparent or presumptive of the incompetent person, including the husband or wife, if any, and, if the incompetent person is entitled to any benefit, estate, or income paid or payable by or through the Veterans' Administration, to the Veterans' Administration.

SEC. 3. Such committee before entering upon the discharge of his duties shall execute a bond, with sufficient sureties, payable to the United States in such penalty amount as the court may order, conditioned for the faithful performance of his duties as such committee; and he shall have control of the estate, real and personal, of the incompetent person, with power to collect all debts due such person, and to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply the annual income of the estate of such person to the support of such person, and the maintenance of his family and education of his children; and shall in all other respects perform the same duties and have the same rights with respect to

the property of such person as pertain to committees of lunatics and idiots.

SEC. 4. When any person for whom a committee has been appointed under the provisions of this Act shall become competent to manage his property, he may apply to such court to have such committee discharged and the care and control of his property restored to him; and if it shall appear to the satisfaction of the court that such applicant is competent to have the care and control of his property, an order shall be entered restoring such person to all the rights and privileges enjoyed before such committee was appointed. The court shall have the same powers with respect to the property of any incompetent person for whom a committee has been so appointed as it has with respect to the property of infants.

SEC. 5. Upon the filing of a petition as provided by this Act the court may, with or without notice or hearing, appoint a temporary committee of the estate of the incompetent, if it deems such action necessary for the protection of such estate. Such temporary committee shall serve only until such time as a permanent committee can be appointed or until sooner discharged.

SEC. 6. If, at any time prior to the appointment of a committee as provided by this Act, the incompetent shall

~~have nominated in the manner provided by this section any person to act as such committee; and if it shall appear to the court that (1) the incompetent was, at the time of making such nomination, competent to do so, (2) the person nominated is willing and qualified to act as such committee, and (3) such appointment is necessary, the court shall appoint such person to be such committee. Such nomination shall be in writing and signed by the incompetent, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the incompetent by at least two credible witnesses. Such nomination shall be revocable only by (A) the burning, canceling, tearing, or obliterating of the same by the incompetent himself or by some other person in his presence and by his express directions or (B) an instrument in writing signed by the incompetent, or by some other person in his presence and by his express directions, and attested and subscribed in his presence by at least two credible witnesses; but no revocation shall be effective unless the incompetent was, at the time of making such revocation, competent to do so.~~ *That if a person residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity properly to care for his property, the United States District Court for the District of Columbia*

may, upon his petition or the sworn petition of one or more of his relatives or friends, appoint some fit person to be conservator of his property.

SEC. 2. Upon the filing of such petition, the court shall fix a time and place for a hearing thereon; and shall cause at least fourteen days' notice thereof to be given to the person for whom a conservator is sought to be appointed if he is not the petitioner, and to such other persons as the court shall direct. The court in its discretion may appoint some disinterested person to act as guardian ad litem in any proceeding hereunder. Upon a finding that such person is incapable of caring for his property, the court shall appoint a conservator who shall have the charge and management of the property of such person subject to the direction of the court.

SEC. 3. Such conservator before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such maximum amount as the court may order, conditioned on the faithful performance of his duties as such conservator; and he shall have control of the estate, real and personal, of the person for whom he has been appointed conservator, with power to collect all debts due such person, and upon authority of the court to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply such part of

the annual income, and such part of the principal as the court may authorize, of the estate of such person to the support of such person, and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of such person as have guardians of the estates of infants.

SEC. 4. When any person for whom a conservator has been appointed under the provisions of this Act shall become competent to manage his property, he may apply to such court to have such conservator discharged and to be restored to the care and control of his property. If the court finds him to be competent, an order shall be entered restoring the care and control of his property to such person. The court shall have the same powers with respect to the property of any person for whom a conservator has been appointed as it has with respect to the property of infants under guardianships.

SEC. 5. Upon filing of a petition as provided by this Act the court may, with or without notice or hearing, appoint a temporary conservator of the estate of any person hereunder, if it deems such action necessary for the protection of such estate, subject to the provisions for an undertaking contained in section 3 hereof. Such temporary conservator shall serve only until such time as a permanent conservator can be appointed or until sooner discharged.

SEC. 6. Where a conservator is appointed pursuant to the provisions of this Act, all contracts and business transactions, subsequent to the filing of the petition, of a person for whom a conservator has been appointed hereunder, shall be presumed to be a fraud upon him and against his rights and interests.

Amend the title so as to read: "A bill to provide for the appointment of conservators to conserve the assets of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity."

any regulation, order, or requirement thereunder. No costs shall be assessed against the Administrator in any proceedings had or taken in accordance with this act.

"'(c) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of this act, or any regulation, order, or requirement thereunder, he may make application to the United States District Court for the District of Columbia for an order enforcing compliance with this act or such regulation, order, or requirement, and upon a proper showing a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

"'DEFINITIONS

"'SEC. 11. As used in this act—

"'(a) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes in the District of Columbia, together with all services supplied in connection with the use or occupancy of such property; but the term "housing accommodations" shall not include (1) any of the accommodations in a hotel in which more than 60 percent of the space devoted to living quarters for tenants and guests is used for furnishing accommodations for transients, or the building constituting such hotel; or (2) furnished nonhousekeeping accommodations, whether or not in a hotel, which are rented as rooms without kitchen privileges or facilities for cooking (but not in a suite of two or more rooms); or (3) any building used as a licensed rooming house.

"'(b) The term "services" includes the furnishing of light, heat, hot and cold water, telephone, elevator service, furnishings, furniture, window shades, screens, awnings, and storage; kitchen, bath, and laundry facilities and privileges; maid service; janitor service; the removal of refuse, and the making of all repairs suited to the housing accommodations or necessitated by ordinary wear and tear; and any other privilege or facility connected with the use or occupancy of housing accommodations.

"'(c) The term "rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received per day, week, month, year, or other period of time, as the case may be, for the use or occupancy of housing accommodations or the transfer of a lease for such accommodations.

"'(d) The term "maximum-rent ceiling" means the maximum rent which may be demanded or received for the use or occupancy of housing accommodations or the transfer of a lease for such accommodations.

"'(e) The term "minimum-service standard" means the minimum service which may be supplied in connection with the renting or leasing of housing accommodations.

"'(f) The term "tenant" includes a subtenant, lease, sublessee, or other person entitled to the use or occupancy of any housing accommodations.

"'(g) The term "landlord" includes an owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any housing accommodations.

"'(h) The term "person" includes one or more individuals, firms, partnerships, corporations, or associations, and any agent, trustee, receiver, assignee, or other representative thereof.

"'(i) The term "documents" includes leases, agreements, records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of the foregoing.

"'SEPARABILITY

"'SEC. 12. If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of the act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

"'APPROPRIATION

"'SEC. 13. There are hereby authorized to be appropriated such funds as may be necessary to carry out the provisions of this act, to be paid out of money in the Treasury of the United States to the credit of the District of Columbia not otherwise appropriated.

"'SHORT TITLE

"'SEC. 14. This act may be cited as the "District of Columbia Emergency Rent Act of 1951".'

"SEC. 2. This act shall take effect on the day following the date of its enactment."

The SPEAKER. The question is on the amendment.

The amendment was agreed to.

The bill was ordered to be read a third time, was read the third time, and passed.

A motion to reconsider was laid on the table.

The proceedings whereby the bill H. R. 4431 was passed were vacated, and that bill laid on the table.

COMMITTEE ON BANKING AND CURRENCY

Mr. SPENCE. Mr. Speaker, I ask unanimous consent that the Committee on Banking and Currency may have until midnight tonight to file a supplemental report on the bill H. R. 3871.

The SPEAKER. Is there objection to the request of the gentleman from Kentucky?

There was no objection.

PROVIDING FOR APPOINTMENT OF CONSERVATORS FOR PERSONS OF ADVANCED AGE AND MENTAL WEAKNESS

Mr. HARRIS. Mr. Speaker, I call up the bill (S. 11) to provide for the appointment of conservators to conserve the assets of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity, and ask unanimous consent that the bill be considered in the House as in Committee of the Whole.

The SPEAKER. Is there objection to the request of the gentleman from Arkansas?

There was no objection.

The Clerk read the bill, as follows:

Be it enacted, etc., That if a person residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity properly to care for his property, the United States District Court for the District of Columbia may, upon his petition or the sworn petition of one or more of his relatives or friends, appoint some fit person to be conservator of his property.

SEC. 2. Upon the filing of such petition, the court shall fix a time and place for a hearing thereon; and shall cause at least 14 days' notice thereof to be given to the person for whom a conservator is sought to be appointed if he is not the petitioner, and to such other persons as the court shall direct. The court in its discretion may appoint some disinterested person to act as guardian ad litem in any proceeding hereunder. Upon a finding that such person is incapable of caring for his property, the court shall appoint a conservator who shall have the charge and management of the property of such person subject to the direction of the court.

SEC. 3. Such conservator before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such maximum amount as the court may order, conditioned on the faithful performance of his duties as such conservator; and he shall have control of the estate, real and personal, of the person for whom he has been appointed conservator, with power to collect all debts due such person, and upon authority of the court to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply such part of the annual income, and such part of the principal as the court may authorize, of the estate of such person to the support of such person, and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of such person as have guardians of the estates of infants.

SEC. 4. When any person for whom a conservator has been appointed under the provisions of this act shall become competent to manage his property, he may apply to such court to have such conservator discharged and to be restored to the care and control of his property. If the court finds him to be competent, an order shall be entered restoring the care and control of his property to such person. The court shall have the same powers with respect to the property of any person for whom a conservator has been appointed as it has with respect to the property of infants under guardianships.

SEC. 5. Upon filing of a petition as provided by this act the court may, with or without notice or hearing, appoint a temporary conservator of the estate of any person hereunder, if it deems such action necessary for the protection of such estate, subject to the provisions for an undertaking contained in section 3 hereof. Such temporary conservator shall serve only until such time as a permanent conservator can be appointed or until sooner discharged.

SEC. 6. Where a conservator is appointed pursuant to the provisions of this act, all contracts and business transactions, subsequent to the filing of the petition, of a person for whom a conservator has been appointed hereunder, shall be presumed to be a fraud upon him and against his rights and interests.

Mr. HARRIS. Mr. Speaker, I move to strike out the last word.

Mr. Speaker, this bill, S. 11, was passed by the Senate on April 11, 1951, and has for its purpose to provide for the appointment of conservators to conserve the assets of persons of advanced age or mental weakness not amounting to unsoundness of mind or physical incapacity.

The bill provides that the District Court of the District of Columbia may appoint a conservator or a person to have charge and control over the properties of persons who have reached certain ages or that status of life where they are not capable mentally of looking after their own property.

I would like to say that under the law of the District of Columbia there are provisions for people who are of unsound mind. The law provides that their property will be taken care of by appointment of a guardian, but we have a condition which exists in the District where people who have reached a certain age or for some reason are mentally incapable of looking after their properties, and some outside or disinterested individual who has no claim

whatsoever on the property, may come in under any method and may be able to obtain the confidence of that person and dispose of the property at their will, and there is no way in the world whereby that situation can be reached.

This matter was called to the attention of both committees in the House and Senate by one of the judges of the District Court. In fact, he advised that there were a number of situations where some provision should be made whereby some person be appointed to take over and look after the property of the parties, under supervision of the court.

I might say for the information of the Members of the House that one of the judges of the United States district court advised us of a case where there was an elderly lady, 88 years old, who was under the absolute domination of a party who had been a roomer in that house for some 15 years. He had obtained most of her cash. He got her to execute a power of attorney giving complete authority to handle her property. He had her make a will leaving everything to him, and, in fact, has had a debt of some $5,500 forgiven. Consequently, this lady who has reached this age is about to be dispossessed of all her property. She is mentally incompetent to do anything about it. It seems that the court cannot move in and do anything about the condition that may exist, as I have explained, unless there is a definite determination as to the sanity of the individual.

There was one case where the court declared the party to be of unsound mind. The case was then appealed and was brought before a jury. The jury determined that this person who had reached the age of senility was mentally sound and that the person was not of unsound mind and consequently was not committed to the hospital.

Mr. O'HARA. Mr. Speaker, will the gentleman yield?

Mr. HARRIS. I yield.

Mr. O'HARA. As I understood the situation, the only way they could take action was upon petition for insanity, and the jury found that this woman was not insane. There was no other provision by which they could proceed.

Mr. HARRIS. That is true. After the jury did find that the person was not of unsound mind and should not be committed, the court had no authority whatsoever to act. Consequently, this situation exists. The purpose of this bill is to relieve that situation which now exists in the District of Columbia.

Mr. KEATING. Mr. Speaker, will the gentleman yield?

Mr. HARRIS. I yield.

Mr. KEATING. Under the provisions of this bill, then, it is not possible to obtain a jury trial in such a case? It is not possible to obtain a jury trial to establish the facts set forth in the first section of the law. Am I correct?

Mr. HARRIS. No, not at all, because there is no way that such a case can be brought into court; there is no provision of law for it.

Mr. KEATING. I do not know that I made myself clear. It is necessary, is it not, under the terms of this bill to establish mental weakness not amounting to insanity, or to establish advanced age, or physical incapacity? Someone must find that as a fact.

Mr. HARRIS. This bill provides that the judge having this matter called to his attention may appoint what this bill calls a conservator, and the conservator would have authority to take over the property of the person involved.

Mr. KEATING. And the judge may do that without any opportunity to be heard on the part of those who may oppose that action?

Mr. HARRIS. He may do it on his own initiative, but it would not deprive the parties to a hearing before the court.

Mr. KEATING. In other words, under this provision, relatives or friends may obtain such a hearing?

Mr. HARRIS. Oh, yes.

Mr. KEATING. If they asked for it and if the person himself were opposed to being adjudged of advanced age or mentally weak, he would have an opportunity to contest the action, would he?

Mr. HARRIS. Very definitely so.

Mr. KEATING. And in such an action, if he sought to contest it, would he be entitled to ask for a jury trial or would it be entirely in the hands of the court to make the determination?

Mr. HARRIS. This, as I understand, does provide for jury trial in cases such as the gentleman mentioned.

Mr. KEATING. I thank the gentleman.

Mr. HARRIS. I understand that the gentleman from Minnesota, one of the very able and esteemed members of our committee, proposes to offer a substitute to this bill. I have had occasion to look it over briefly and, as I understand, he will explain that it proposes to accomplish the same objective. If so, perhaps it might be a better procedure.

Mr. O'HARA. Mr. Speaker, I move to strike out the last word and ask unanimous consent to proceed for 10 additional minutes.

The SPEAKER. Without objection, the gentleman from Minnesota may proceed for 10 additional minutes.

There was no objection.

The SPEAKER. The gentleman from Minnesota is recognized for 15 minutes.

Does the gentleman wish to offer his amendment now?

Mr. O'HARA. Mr. Speaker, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. O'HARA: Strike out all after the enacting clause and insert the following: "That if an adult person residing in or having property in the District of Columbia because of old age or imperfection or deterioration of mentality is incompetent to manage his person or estate, or any person because of gambling, idleness, or debauchery so spends or wastes his estate or injures his person as to be likely to expose himself or his family to want or suffering or physical incapacity to properly care for his property, the United States District Court for the District of Columbia may upon his petition or the sworn petition of any person appoint some fit person to be guardian of his property or his person or both.

"SEC. 2. The petition shall show—

"1. The name and address of the person for whom the guardian is sought;

"2. The date and place of his birth, if known;

"3. The names and addresses of his spouse, if any, parents, if any, children, if any, or if there be no known spouse, parents or children, the names and addresses of his nearest kindred;

"4. The reasons for the guardianship;

"5. The probable value and general character of his real and personal property, and the probable amount of his debts;

"6. The name, age, address, and occupation of the proposed guardian.

"SEC. 3. Upon filing such petition, the court shall fix the time and place for hearing thereon and shall cause at least 14 days notice thereof to be given to the person for whom the guardian is sought to be appointed, if he is not the petitioner, and to such other persons as the court shall direct. The court, in its discretion, may appoint some disinterested person to act as guardian ad litem in any proceeding hereunder.

"SEC. 4. Upon proof of the petition the court shall appoint one or two persons suitable and competent to discharge the trust as general guardians of the person or estate or of both.

"SEC. 5. Such guardian before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such maximum amount as the court may order, conditioned upon the faithful performance of his duties as such guardian, and he shall have control of the estate, real and personal, of the person for whom he has been appointed guardian and of the person, if the court so directs, with power to collect all debts due such person, and upon approval of the court, to adjust and settle all accounts owed by him, and to sue and be sued in his representative capacity. He shall apply such part of the annual income and such part of the principal as the court may authorize, of the estate of such person to the support of such person and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of such persons as have guardians of the estates of infants.

"SEC. 6. When any person for whom a guardian has been appointed under the provisions of this act shall become competent to manage his property, he may apply to such court to have such guardian discharged and to be restored to capacity. If the court finds him to be competent, an order shall be entered restoring the care and control of his property to such person and the court shall direct that he be restored to capacity. The court shall have the same powers with respect to the property and person for whom a guardian has been appointed under the provisions of this act as it has with respect to the persons and property of infants under guardianship.

"SEC. 7. Upon the filing of a petition as provided by this act, the court may with or without notice of hearing appoint a temporary guardian of the estate of any person hereunder if it deems such action necessary for the protection of such estate, subject to the provisions for an undertaking contained in section 5 hereof. Such temporary guardian shall serve only until such time as a permanent guardian can be appointed or until sooner discharged.

"SEC. 8. Lis pendens: Upon the filing of a petition hereunder, a certified copy of such petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a guardian be appointed on such petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after such filing and before the termination of the guardianship shall be void."

Mr. O'HARA. Mr. Speaker, this legislation, as has been explained by the gentleman from Arkansas, originated out of the anomalous situation which exists in the District of Columbia that if an individual is not insane or is not a drunkard

or a drug addict there is nothing that can be done by the court to protect that individual or to preserve the assets of the individual against waste.

This bill was presented to our committee very hurriedly, and I felt at the time the matter was considered by our committee in executive session that further consideration should be had on the bill. I asked for that consideration, but my good friend from Arkansas and the rest of the members of the committee felt it should be reported immediately.

Mr. HARRIS. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from Arkansas.

Mr. HARRIS. I should like to say, in order to complete the record, that we did take cognizance of the fact hearings were held in the Senate and we had copies of those hearings.

Mr. O'HARA. I never saw them or had an opportunity to see them. They may have been before the gentleman, but I did not have an opportunity to see them.

This last Saturday I became further constrained to check on the condition which exists in the statutes of the District of Columbia, the code, and I find there is provision in there for the appointment of guardians for infants and for insane persons. Many years ago they passed a separate statute pertaining to drunkards and drug addicts, and there they provided for the appointment of a committee to act.

Now they come along with another bill by which they attempt to appoint a conservator under the rather anomalous situation which exists, which rises out of one case downtown. They have sort of geared this bill to one case where the person involved is rather aged and senile. They make provision for the appointment of a conservator of the property, but give no regard for the care and custody of the person of the alleged incompetent except by general language providing that the conservator collect the income and pay out such of the principal and income as is necessary for the maintenance of the individual or his family.

Many of you have had these rather tragic experiences of dealing in your home States with persons who are in the shadowland between normal and subnormal, yet they are not insane or totally incompetent. They are perhaps incompetent to rightfully manage their property and by reason of some other condition which may exist they are wasting their property or causing a waste of their property and are liable to subject themselves and their loved ones to want. In most States—in fact, in as many as I know anything about—they have specific provisions to take care of that sort of situation. Generally it is just as important that you protect the individual as his property. It is equally important that someone is looking after the individual or the proposed ward. So I took the time to prepare what I think spells out, not a quicky appointment of someone to look out after someone's property but an orderly way in which the individual is protected, and that the court set up the procedure that everyone who is entitled to notice in the discretion of the court should have notice.

I hope my good friend from Arkansas will agree that this bill is far more specific than the one which was passed by the other body and which was sent up from downtown.

Mr. KEATING. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from New York.

Mr. KEATING. As I read S. 11 very hurriedly, there is no provision in it about notice to those who might be interested, such as is contained in the gentleman's substitute.

Mr. O'HARA. Yes. I think it provides that notice shall be given to the person for whom the conservator is sought and other persons as the court may direct. I think it does provide for that.

Mr. HARRIS. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from Arkansas.

Mr. HARRIS. In reply to the gentleman from New York you will find on page 2, section 2, this language:

> Upon the filing of such petition, the court shall fix the time and place for a hearing thereon; and shall cause at least 14 days' notice thereof to be given—

The same as provided in the gentleman's proposal.

Mr. KEATING. Yes, I do see that now, but in the gentleman's substitute he is more specific, is he not, about just who shall get that notice?

Mr. O'HARA. Let me say to the gentleman that I provide that the petition shall set out the family relationship, if any. Certainly I would not think too much of a court that failed to give notice to the spouse or children, because they, in the very essence of things, are extremely interested.

Mr. KEATING. And would usually be better able to know whether the proceedings should be contested than the person himself that was under scrutiny.

Mr. O'HARA. The gentleman is absolutely correct.

Mr. BELCHER. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from Oklahoma.

Mr. BELCHER. Does this substitute provide for the filing of a report by the guardian, and the approval of the court?

Mr. O'HARA. Yes, and, let me say, he is circumscribed generally speaking, to the control of the court in all respects. If he wants to be protected the guardian better be careful and get the consent of the court on these things in connection with both the ward and the estate.

Mr. BELCHER. I think that is a very essential part of any bill.

Mr. O'HARA. Let me say that the original bill is rather cloudy. The title of the act is defective and it is difficult to know whether it provides for only unsoundness of mind or physical incapacity. Let me say that the original bill is further very definitely lacking in its consideration of the personal needs which the ward may have of someone looking after him. That is why I provide for one or two persons. You might have a situation where some disinterested person might necessarily need to be appointed as the guardian of the estate, and yet some member of the family should be appointed for the well being of the ward as the guardian of the person. But, certainly, if you have a critical situation where it is necessary to appoint a guardian for the ward, that the physical well being of the ward should be of as much consideration as the estate.

Mr. WERDEL. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from California.

Mr. WERDEL. Did I understand one of the purposes of the gentleman's substitute to be that where the ward is of that mental capacity that he cannot take care of his property and that a guardian is to be appointed, that you also make the guardian the guardian of the ward?

Mr. O'HARA. No. I provide that the court may appoint one or two persons. He may appoint the same guardian as guardian of the person and the estate. I leave it in the plural; that he can appoint two, one in charge of each.

Mr. WERDEL. As I understood the proceedings and the original discussion of the gentleman from Arkansas, there is now in the law of the District of Columbia provision for appointing a guardian of the person, that is, of an insane person.

Mr. O'HARA. Of an insane person, and of infants.

Mr. WERDEL. When you appoint a guardian of a person you also make that guardian the guardian of the estate of that person. You have to take charge of his estate. Most of our States have provisions, as the gentleman says, to appoint guardians of the estates of persons who are not competent to handle their own estates, but they are free to travel about as they see fit. You do not have a guardian of the person.

Mr. O'HARA. That is provided in this bill. The bill provides that the court may appoint a guardian of the person or of the estate, or both, as he sees fit. It is amply protected.

Mr. KEATING. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from New York.

Mr. KEATING. Does the gentleman's substitute have any provisions similar to those in section 4 of the principal bill? It would seem to me desirable to give the adjudged person an opportunity, if he gets free of his disability, to apply to have his conservator or conservators discharged.

Mr. O'HARA. That is in substance the language I have provided in my substitute, so there is ample protection, but it is limited to the ward himself rather than permitting some officious intermeddler to come in.

Mr. KEATING. That is right; I think it should be that way. That is amply covered?

Mr. O'HARA. That is amply covered, I may say to the gentleman.

One other feature I have provided in here, which I think took care of a rather obnoxious provision in the original bill, relates to the filing of a lis pendens, which is oftentimes necessary. In my practice I had such an occasion where a man by reason of drunkenness was wast-

ing his property and subjecting his family to want. Some sharpshooters were trying to get him to dispose of his property. He happened to be a widower. There is a provision in my own State that you may file such a petition, and file a copy of such in the register of deeds office, and it can be indexed against the property. It is immediately notice to anyone attempting to deal with the individual that he is under question as being a competent person. That, of course, would amount to public notice to anyone so attempting to take advantage of such an individual.

I would have preferred, if we could have had a little time, to include in this bill the sections dealing with drunkenness and drink addicts, so that they could have been covered, and the old statute repealed, although I will say frankly that it undoubtedly is covered in the broad language of the bill. However, due to the peculiar present statute that exists as to drunkenness and drink addiction, I did not want to put it in here because there might be a question whether it was germane if I attempted to do so.

Mr. BELCHER. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield to the gentleman from Oklahoma.

Mr. BELCHER. Do I correctly understand that under the gentleman's amendment the person would be entitled to a jury trial?

Mr. O'HARA. No; not under this amendment. It is provided in the statute here that a person proceeded against on the ground of insanity has the right to demand a jury trial, as happened in the case mentioned by the gentleman from Arkansas, but I do not see any justification for a jury trial in the questions involved in this matter. I know in my home State there is no such provision. We have ample provision for appeal and review if the court goes astray.

Mr. BELCHER. We have the same thing in Oklahoma. The party is not entitled to a jury trial. I do not think it is a good provision to make him subject to a jury trial because there are too many ways to mislead the jury, and the jury does not have an opportunity to observe the party.

Mr. O'HARA. I think the gentleman is completely right.

Mr. BELCHER. So I think it is right not to have it subject to a jury trial.

Mr. KEATING. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield.

Mr. KEATING. I understood the gentleman from Arkansas in replying to an inquiry which I made that under the bill itself a person would have an opportunity for a jury trial if he so desired to oppose the adjudication set forth in the first paragraph. The gentleman from Arkansas, of course, possibly might not have understood my question and perhaps gave me an answer which was not exactly correct. But I wonder whether that was a respect in which your substitute differed from the original bill or whether whatever the answer is, the same answer would apply to either your substitute or the original bill.

Mr. O'HARA. It would be a question whether the law of the District of Columbia so provides for jury trial. My amendment makes no such provision.

Mr. HARRIS. That is my understanding, though it is not covered in either the pending bill as passed by the other body, or the gentleman's amendment. I think it is a provision of law under which a person is entitled to that. It was discussed somewhat at length in the course of the hearings held by the Senate committee. I should like to say at this point that this bill, Senate bill 11, was not brought to the Congress by the Commissioners of the District of Columbia. It was presented by the Bar Association of the District of Columbia who felt that the problem was worked out very well so as to meet the situation. Therefore, I say this because I think you would be interested in knowing the history of it and how it originated. Certainly the committee of the bar of the District of Columbia is not going to present something to us without their usual thorough consideration.

The SPEAKER. The time of the gentleman from Minnesota has expired.

Mr. O'HARA. Mr. Speaker, I ask unanimous consent to proceed for two additional minutes.

The SPEAKER. Is there objection to the request of the gentleman from Minnesota?

There was no objection.

Mr. O'HARA. I did not know that the bar had presented it. The report did not show that. But I would suggest to them that if they were looking into the matter and presenting this matter to us for our consideration they should consider how many different situations there might be other than guardians and conservators and committees. It would seem to me a sound principle to provide for guardianships rather than figure out some new name to call somebody.

Mr. MORRIS. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I yield.

Mr. MORRIS. Does your bill cover also physical incapacity? I was listening, but I might have missed that.

Mr. O'HARA. Let me read to the gentleman what it covers:

An adult person who because of old age or imperfection or deterioration of mentality, is incompetent to manage his person or estate or any person who because of gambling, idleness, or debauchery, so spends or wastes his estate or injures his person as to be likely to expose himself or his family to want or suffering, or physical incapacity to properly care for his property.

Mr. MORRIS. Then physical incapacity is covered.

Mr. O'HARA. Yes.

Mr. ROGERS of Colorado. Mr. Speaker, will the gentleman yield?

Mr. O'HARA. I am happy to yield to the gentleman.

Mr. ROGERS of Colorado. Do I understand that under the petition filed under the gentleman's amendment this notice is then given to the heirs or persons interested?

Mr. O'HARA. The mandatory provision is that notice must be served upon the person of the ward, and such other persons as the court may direct. But in my amendment I provide that it must state if there is any spouse, parents, or children. The original bill makes no reference to that. I do not provide any compulsion on the court to give notice to such children or spouse, but it would certainly seem to me that if such information is contained in the petition, such notice would be given.

Mr. ROGERS of Colorado. Then I understand that the statute would not require notice other than as the court itself may determine as to the process that may be served on others than the incompetent?

Mr. O'HARA. The gentleman is correct. Both the Senate bill No. 11 passed by the other body and my amendment so provide, which I believe is consistent with the statutes of most of the States.

Mr. ROGERS of Colorado. Then what hearing is had before the court to ascertain whether or not this individual is incompetent?

Mr. O'HARA. The court sets the time and place of the hearing in the notice.

Mr. ROGERS of Colorado. The court itself passes upon the question of whether or not the person is incompetent?

Mr. O'HARA. That is correct, subject to any District of Columbia provisions as to jury trial.

Mr. ROGERS of Colorado. As I understand this bill it is not necessary for that person to be insane to the point that the statutes of the District of Columbia ordinarily would apply?

Mr. O'HARA. That is correct.

Mr. ROGERS of Colorado. But that if in the opinion only of the judge before whom the petition is filed the person is declared incompetent, there is a likelihood that an individual who may still be mentally competent, as we construe mental competence within the law, the court may without any further proof take his property away from him? Is that likely to happen?

Mr. O'HARA. No. Let me say that the customary situation, as I understand the practice both here and elsewhere, is that of course there must be adduced before the court sufficient proof to convince the court that the person was in need of a guardian, or someone to look after his property or his person, or both. It could not be based simply upon a written petition, but would have to be supported as testimony in any other case.

Mr. ROGERS of Colorado. Mr. Speaker, will the gentleman yield further?

Mr. O'HARA. I yield.

Mr. ROGERS of Colorado. While I am not familiar with the law in the District of Columbia, is there some provision made for a jury trial to determine the competency or incompetency of the person?

Mr. O'HARA. It is not made in this act or in the act which was before us in the committee. Whether there is provision in the general District law for a jury trial, is not clear in my own mind. There is a direct provision on an insanity petition in this District for a person to demand a jury trial, and they are entitled as a matter of right to a jury

trial. It is the practice in my own State, and I believe the majority of States, upon petition for guardianship such as this, that there is no provision for a jury trial. In my own State we have a right of appeal to the district court from the probate court. In the District of Columbia they are before the United States District Court as it is.

Mr. ROGERS of Colorado. Would not the effect of this bill and the gentleman's amendment seek to deprive an individual, whose folks may determine that the individual is senile or incapable of handling his property, the right to petition the court on the proper testimony of psychiatrists and others, and the individual could be deprived of his property without the question of a jury determining his mental condition?

Mr. O'HARA. May I say to the gentleman, I do not think the appointment of a guardian is depriving a person of his property, in any sense of the word. It might deprive him of the management of it in some degree, but it is still his property.

Mr. ROGERS of Colorado. Does the gentleman understand that if a guardian was appointed in this case he would be authorized under court order to take possession of all of the property of the person?

Mr. O'HARA. That is true. And he would be held accountable to the court for it.

Mr. ROGERS of Colorado. Would be legally responsible?

Mr. O'HARA. That is correct.

Mr. ROGERS of Colorado. But is there any provision in this bill, or in the amendment that has been offered, that this person, upon recovering from that senility or inability to properly manage his property, can have it restored to him?

Mr. O'HARA. That is correct. Both the bill and my amendment provide the absolute right of the ward to come in and petition, upon restoration of his capacity. That again comes before the court both as to his mental and physical capacity.

The SPEAKER. The time of the gentleman from Minnesota has again expired.

Mr. STEED. Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD immediately following the conclusion of the consideration of this bill.

The SPEAKER. Is there objection to the request of the gentleman from Oklahoma?

There was no objection.

Mr. HARRIS. Mr. Speaker, I move to strike out the last word.

Mr. Speaker, I take this time in the hope that we may come to some mutual understanding and avoid a lot of additional time and make it necessary for a drawn-out consideration of this bill.

As I explained, the purpose of the bill as introduced on the recommendation of the Bar Association of the District of Columbia, was to make provisions for persons who were physically incapable of looking after their own affairs, because of old age and so forth, but yet they are not of unsound mind, and so determined by the courts. I explained to you a particular case which was brought to the attention of the District Court for the District of Columbia, and I am advised, and the hearings revealed that there are many such cases that are called to the attention of the judges from time to time. This bill is designed to do something about it.

I have listened to the gentleman from Minnesota as attentively as I could; I have tried to follow him, and I have come to the conclusion that his substitute does about the same thing and includes practically everything that this one does except it is a little tighter in its language, not quite as broad in its general form; and it does not include any provision whatsoever with reference to pending contracts. Am I right about that?

Mr. O'HARA. No; the gentleman is not correct about that.

Mr. HARRIS. I want to be set right on it.

Mr. O'HARA. In my substitute it is provided that upon the filing of the petition hereunder—that could be either temporary or permanent—certified copy of such petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. 'If a guardian be appointed on such petition, all contracts except for necessaries and all transfers of real and personal property made by the ward after such filing and before the termination of the guardianship shall be void. I make them absolutely void; they are not voidable; they are void.

Mr. HARRIS. Then it seems to me, Mr. Speaker, that we have pretty much the same thing presented to us here in connection with the bill and the substitute offered by the gentleman from Minnesota on this floor. In the brief time I have had to consider it I cannot see too much difference between them at all. I may say that before the Senate committee a representative of the bar association testified after the corporation counsel, Mr. Vernon West, then the chairman of the commission on mental health of the District Bar Association testified and said:

> I am so enthusiastically in favor of the bill that I do not like to see too many lines cut from it.

That statement was made by Mr. Thuee, chairman of the commission on mental health. He said he was not presenting the matter as the official representative of the bar association, because Mr. Mann, who was the official representative of the bar association, had just come in. But he testified on a similar bill in the last Congress and was also chairman of the commission on mental health and consequently was interested in this problem. He made the statement out of the fact that Senators McCARTHY, PASTORE, and NEELY had made some statements with reference to the general provisions being too broad. That was his reply.

Mr. O'HARA. Mr. Speaker, will the gentleman yield?

Mr. HARRIS. I yield.

Mr. O'HARA. Will the gentleman tell me if there is any place in this bill where we have this void that exists where there is not anything here but for the conserving of the property and no power of the court to appoint someone to care for and look after a ward in unsound mental condition?

Mr. HARRIS. That is the major difference between the two proposals here. The judges of the District Court did not make any suggestion or request that they be given authority to appoint someone to have custody over the individual or the person; their attention had been called to these abuses in connection with the property. They did not come to us and ask us to give them this authority to appoint a guardian over the person, but to give them the authority to designate someone to have charge of their property that it be not squandered and disposed of by some party who had no interest whatsoever. Now, as I understand it, the gentleman's amendment, in his opinion—and I know he is thoroughly convinced that it is the proper procedure—proposes to give the court jurisdiction and authority to reach such cases as have been brought to our attention in a letter of a few days ago?

Mr. O'HARA. Does the gentleman think that is as equally humane and as important as preserving their property?

Mr. HARRIS. Do I understand that the court has authority to take immediate jurisdiction over it?

Mr. O'HARA. That is correct.

Mr. HARRIS. When the matter is called to his attention, either on his own initiative or by petition from somebody else?

Mr. O'HARA. Yes; by temporary order, of course. He could not take snap judgment without giving notice except through the appointment of a temporary guardian.

The SPEAKER. The time of the gentleman from Arkansas has expired.

Mr. FORRESTER. Mr. Speaker, I ask unanimous consent that the gentleman may proceed for two additional minutes.

The SPEAKER. Is there objection to the request of the gentleman from Georgia?

There was no objection.

Mr. FORRESTER. Mr. Speaker, will the gentleman yield?

Mr. HARRIS. I yield to the gentleman from Georgia.

Mr. FORRESTER. I want to inquire of the gentleman if he will enlighten us as to the pay this conservator would receive for performance of the duties set out in this Act or in the amendment?

Mr. HARRIS. Under the bill as presented by the committee, the general laws of the District of Columbia in such matters would apply, giving the court authority to determine that. I assume the same procedure would apply under the gentleman's substitute.

Mr. O'HARA. There is no question that both under the bill and under my proposed substitute, they would be completely controlled as to the amount of fees by the court, the same as any other guardian.

Mr. FORRESTER. I do not see that. Where is that in this bill?

Mr. HARRIS. You will find it on page 3 in the bill.

Mr. O'HARA. Lines 3 and 4 show that in the bill.

Mr. HARRIS. In the bill?

Mr. O'HARA. Yes. I have a similar provision in my substitute.

Mr. FORRESTER. I notice that, but I do not think that would be authority for payment.

Mr. HARRIS. I believe that is one of the purposes of the provision.

Mr. FORRESTER. As I understand the rules of law generally, no one is ever paid for any service except as expressly provided by statute and I do not see anything expressly pointing that out. I raise that point on account of the fact that a laborer is worthy of his hire and I believe you would be in danger in placing someone in as conservator unless it is expressly provided that he is to receive proper remuneration.

Mr. HARRIS. I may say to the gentleman it is my understanding that the court has that authority.

Mr. KEATING. Mr. Speaker, will the gentleman yield?

Mr. HARRIS. I yield to the gentleman from New York.

Mr. KEATING. The substitute offered by the gentleman from Minnesota has a provision about the filing of lis pendens. Is that in the bill presented by the committee?

Mr. HARRIS. No, it is not. The only provision that relates to it would be on page 3 of the bill.

Mr. KEATING. About appointing of a temporary conservator?

Mr. HARRIS. Section 5.

Mr. KEATING. Does the gentleman feel that section 5, covering a temporary conservator, would take the place perhaps of the provision in the bill offered by the gentleman from Minnesota about filing lis pendens?

Mr. HARRIS. So far as I know, that would be the interpretation.

The SPEAKER. The question is on the amendment offered by the gentleman from Minnesota [Mr. O'HARA].

The amendment was agreed to.

Mr. O'HARA. Mr. Speaker, a parliamentary inquiry.

The SPEAKER. The gentleman will state it.

Mr. O'HARA. Mr. Speaker, in my opinion, the title of the act in the bill S. 11 is somewhat defective.

The SPEAKER. We will come to that later after the passage of the bill. The question is on the third reading of the bill.

The bill was ordered to be read a third time and was read the third time.

The SPEAKER. The question is on the passage of the bill.

The bill was passed.

Mr. O'HARA. Mr. Speaker, I offer an amendment to the title of the bill.

The Clerk read as follows:

Amendment to the title offered by Mr. O'HARA: "To provide for the appointment of guardians of adult persons who because of old age or deterioration of mentality are incompetent to manage their person or estate, or of any person who because of gambling, idleness, or debauchery so spends or wastes his estate or injures his person as to be likely to expose himself or his family to want or suffering."

The amendment to the title was agreed to.

A motion to reconsider was laid on the table.

CONTROLS ARE IMPORTANT FOR GOVERNMENTS AT HOME

Mr. ZABLOCKI. Mr. Speaker, I ask unanimous consent to address the House for 1 minute and to revise and extend my remarks and include a table.

The SPEAKER. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. ZABLOCKI. Mr. Speaker, I had just returned from a week end in my district, where I had an opportunity to obtain first-hand information concerning the effect of price increases on items used by our city's government. I thought that the Members of this body, who will consider the Defense Production Act extension measure this week, may be interested in some statistics pertaining to the rise in the cost of local government, as experienced by the city of Milwaukee.

The inflation which was let loose in this country after the outbreak of the Korean conflict has put the people of the Fifth Congressional District and the people of my district—which comprise the metropolitan area of the city of Milwaukee—in a squeeze. They are paying high prices for food, for clothing, for other necessities, for rent, and, although they do not always realize it, their city government is also costing them a lot more.

They are paying 8.1 percent more for a loaf of bread than they did before Korea. Coffee has gone up more than twice as much percentagewise. Round steak is up 13 cents a pound—a rise of 13.3 percent. The market basket of the average household brings home a lot less now than it did 12 months ago.

The same is true of the purchasing made by the city government. The city purchasing agent brings home a lot less now than he was able to last year. A check of prices on things needed by the city government shows that in many cases they are running 50 percent higher than last year. It is going to cost the city of Milwaukee about $4,000,000 more for necessary purchases than they figured on when the 1951 budget was adopted. Frankly, Mr. Speaker, unless we take strong action to control our economy in this time of crisis, we are going to have a serious situation in many of our cities. Many public services may have to be curtailed.

Here are some examples of the increased costs. They range from 18 percent on traffic marker castings, to 74 percent on truck-mounted air compressors. They include such items as manhole covers, and spreaders, cable, paint, lumber, and so on.

For 127 manhole covers, for instance, the city has to pay $3,210. The same number of manhole covers would have cost $2,584 1 year ago. This is an increase of 24 percent. Tires and tubes for the city will cost $54,216 this year against $33,885 last year, a rise of 60 percent. Four thousand curb stops have risen from $5,620 to $9,133, an increase of 63 percent.

Inflation has even hit the American flag. The city of Milwaukee is a patriotic American community. During the year we need about 60,000 flags. The price on these flags has risen from $3,240 to $4,110.

The rises in cost which I have set forth here are not ones which we often think about. We are more apt to turn our attention to food, clothing, rent and other items. But, it is the American citizen that pays the cost of his city government. These costs are just as important to him as his other living costs.

Mr. Speaker, I wish to include a table, showing the increase in price which the city of Milwaukee is paying on the chief items which it needs. From what I can find out, the experience of Milwaukee is typical of the experiences being had by other cities. This is a problem that we must keep at the front of our thinking during the discussion of economic controls under the Defense Production Act.

Commodity	Previous price	1950	Latest price	1951	Percent increase
840 gray iron traffic marker castings	$4,977	February	$5,845	February	18
52,000 feet 6- and 8-inch cast-iron water pipe	84,840	September	100,040	March	18
1,100 gray iron transformer case castings	3,403	February	4,826	February	41
7,000 manhole steps	7,810	May and September 1949.	11,163	January	43
127 gray iron square manhole covers	2,584	February	3,210	February	24
128,000 feet electric cable	30,000	March and July	42,822	January	43
Annual requirements of tires and tubes	33,885	Entire year	54,216	Entire year	60
4 motorcycle Servi-Cars	4,300	July	4,890	January	14
800 each, 6- and 8-inch gate valves	28,705	August 1947	36,174	do	26
475 each, transformer coils	4,487	March	6,338	do	41
12,800 feet 2½-inch fire hose	10,537	July 1949	14,651	do	39
14,300 firebrick	1,434	March	2,033	do	42
17 motorcycles	13,108	do	18,100	do	38
2 combination ambulance-patrols	6,380	April	7,936	do	24
17 tons arsenate of lead	7,310	March	8,751	February	20
2,000 gallons yellow street-marking paint	3,290	do	4,370	do	33
1,400 aluminum street lighting lantern castings	3,469	April	5,541	do	60
4,000 corporation and curb stops	5,620	May	9,133	do	63
1,000 gallons interior semigloss white wall paint	2,329	February	2,910	March	25
2 gasoline-powered truck-mounted air compressors	6,361	June 1949	11,079	do	74
14,840 board feet mixed oak bridge plank	1,853	August	2,312	do	25
60,000 United States flags 8 by 12 inches	3,240	May	4,110	do	27
24 sand spreaders	4,200	January	5,496	do	31
2,400 pounds brown kraft wrapping paper	216	Entire year	336	Entire year	55
13,200 feet 1½- and 1-inch galvanized conduit	1,811	March	1,954	March	8
1 office desk, 60-by 36-inch flat top—Yawman & Erbe No. 6004-31	118	April	168	April	43
680 cases paper towels	1,852	August	2,632	May	42

App'x 13

82D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 1026

APPOINTMENT OF CONSERVATORS IN THE DISTRICT OF COLUMBIA TO PROTECT THE INTERESTS OF PERSONS INCAPABLE OF MANAGING THEIR PROPERTY

SEPTEMBER 24, 1951.—Ordered to be printed

Mr. HARRIS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 11]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 11) to provide for the appointment of conservators to conserve the assets of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following: *That if an adult person residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity properly to care for his property, the United States District Court for the District of Columbia may, upon his petition or the sworn petition of one or more of his relatives or any other person or persons, appoint some fit person to be conservator of his property.*

SEC. 2. Upon the filing of such petition, the court shall fix a time and place for a hearing thereon; and shall cause at least fourteen days' notice thereof to be given to the person for whom a conservator is sought to be appointed, if he is not the petitioner, and to such other persons as the court shall direct. The petition shall include, among other things—

(1) the reasons for the appointment of a conservator;

(2) the name and address of the person for whom the conservator is sought;

(3) the date and place of his birth, if known; and

(4) the names and addresses of the nearest known heirs at law, or the next of kin, if any.

The court in its discretion may appoint some disinterested person to act as guardian ad litem in any proceeding hereunder. Upon a finding that the person for whom the conservator is sought is incapable of caring for his property, the court shall appoint a conservator who shall have the charge and management of the property of such person subject to the direction of the court.

SEC. 3. Such conservator before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such maximum amount as the court may order, conditioned on the faithful performance of his duties as such conservator; and he shall have control of the estate, real and personal, of the person for whom he has been appointed conservator, with power to collect all debts due such person, and upon authority of the court to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply such part of the annual income and such part of the principal of the estate of such person as the court may authorize to the support of such person and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of such person as have guardians of the estates of infants.

SEC. 4. When any person for whom a conservator has been appointed under the provisions of this Act shall become competent to manage his property, he may apply to such court to have such conservator discharged and to be restored to the care and control of his property. If the court finds him to be competent, an order shall be entered restoring the care and control of his property to such person. The court shall have the same powers with respect to the property of any person for whom a conservator has been appointed as it has with respect to the property of infants under guardianships.

SEC. 5. Upon filing of a petition as provided by this Act the court may, with or without notice or hearing, appoint a temporary conservator of the estate of any person hereunder, if it deems such action necessary for the protection of such estate, subject to the provisions for an undertaking contained in section 3 hereof. Such temporary conservator shall serve only until such time as a permanent conservator can be appointed or until sooner discharged.

SEC. 6. The court, in its discretion, may at any time order that the conservator or some other person shall be responsible for the personal welfare of the person whose property is under conservatorship. In such event the conservator or such other person, subject to the direction and control of the Civil Division of the court, shall have the same powers and duties with respect to the personal welfare of the said person as have the guardians of the persons of infants under guardianships.

SEC. 7. Lis pendens: Upon the filing of a petition hereunder, a certified copy of such petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator be appointed on such petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after such filing and before the termination of the conservatorship shall be void.

And the House agree to the same.

That the title of the bill be amended to read as follows: "An Act to provide for the appointment of conservators to conserve the assets

and provide for the pe
mental weakness, not an
incapacity."

and provide for the personal welfare of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity."

OREN HARRIS,
T. G. ABERNETHY,
JOSEPH P. O'HARA,
Managers on the Part of the House.
JOHN O. PASTORE,
WILLIS SMITH,
JOHN M. BUTLER,
Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 11) to provide for the appointment of conservators to conserve the assets of persons of advanced age, mental weakness, not amounting to unsoundness of mind, or physical incapacity, submit the following statement in explanation of the effect of the action agreed upon the conferees and recommended in the accompanying conference report:

The House amendment was passed in lieu of all of the Senate bill after the enacting clause. The accompanying conference report recommends the adoption of a substitute for both the Senate bill and the House amendment.

The differences between the House amendment and the conference substitute, except for merely formal differences and minor clerical and conforming changes, are explained below.

The first section of the Senate bill provided for the appointment of conservators to conserve the property of individuals residing or having property in the District of Columbia who, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity are incapable of caring for such property. The House amendment included a clause providing for such appointments in certain additional cases where such individuals, because of gambling, idleness, or debauchery, so spend or waste their estates or injure their persons as to be likely to expose themselves or their families to want or suffering. The first section of the conference substitute omits the clause which was added by the House amendment and adopts substantially the language of the Senate bill, except that the application of the section is limited in terms to adults, as it was in the House amendment, in order to show clearly that it is not intended to supplant existing laws relating to the property of minors.

Section 2 of the conference substitute, following the House amendment, lists some of the information which is to be included in the petition for a conservator, but omits the House language specifically requiring that the petition designate the proposed conservator and describe the property and debts of the person for whom the conservator is sought.

The House amendment provided for the appointment of guardians of the persons, as well as of the property, of the individuals referred to in the first section, while the Senate bill provided only for conservators of the property of such individuals. The conference substitute generally follows the Senate bill and strikes out all references to personal guardians, but adds a new section 6 which provides that the court may at any time order that the conservator or some other person shall be responsible for the personal welfare of the individual whose property is under conservatorship.

Since responsibility for the personal welfare of individuals under conservatorship is exclusively provided for under the new section 6,

the conference substitute omits the authority (which was contained in sec. 4 of the House amendment) for appointment of more than one guardian for any one individual, and uses the Senate term "conservator" throughout in lieu of the House term "guardian".

The conference substitute embodies section 8 of the House amendment, which provided that all contracts (except for necessaries) and property transfers made by an individual under conservatorship shall be void. The corresponding section of the Senate bill provided only that contracts and business transactions of any such individual shall be presumed to be a fraud upon the conservator.

The title of the conference substitute is the same as the title of the Senate bill, except that additional language has been inserted to indicate that (in sec. 6 of the conference substitute) the personal welfare of individuals whose property is under conservatorship has been adequately provided for.

OREN HARRIS,
T. G. ABERNETHY,
JOSEPH P. O'HARA,
Managers on the Part of the House.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,270

DOROTHY E. ROSSI, *Appellant*

v.

ELSIE A. FLETCHER, *Appellee*

On Appeal From the United States District Court for the District of Columbia

JEREMIAH C. COLLINS
WILLIAM E. McDANIELS
1000 Hill Building
Washington, D. C. 20006
Attorneys for Appellee

Of Counsel:

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006

Press of Byron S. Adams Printing, Inc., Washington, D. C.

INDEX

TABLE OF AUTHORITIES

CASES:

QUESTION PRESENTED

Does that section of the Conservators Statute of the District of Columbia Code which provides in part that "all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void" mean that as a matter of law all wards regardless of their actual mental capacity are powerless to make a will?

This case has not been before this court under this name or any other name.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,270

DOROTHY H. ROSSI, *Appellant*

v.

EARL A. FLETCHER, *Appellee*

On Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellant, the caveator, has appealed from the judgment of the District Court denying her caveat complaint and admitting to probate a paper writing dated August 31, 1963 as the Last Will and Testament of Mollie Roberts McGilton. (J.A. 14) Caveator limits her appeal to a single conclusion of law by the court below:

> The provisions of D.C. Code Section 21-507 (21-1507) do not render the will in question invalid as a matter of law. (J.A. 13)

Caveator does not dispute the conclusions of law that undue influence and lack of testamentary capacity were

not made out. (J.A. 13) Nor does she dispute any of the findings of fact one of which was that the testator "possessed the requisite testamentary capacity to execute a will." (J.A. 13) Rather, the appeal is confined to the issue decided against the caveator below: Whether under the existing statutory scheme in the District of Columbia the testator was incapable as a matter of law of executing a valid will.

STATUTES INVOLVED

District of Columbia Code Title 18, Wills and Probate of Wills, provides in pertinent part:

> § 18-102. Capacity to make a will[1]
>
> A will, testament, or codicil is not valid for any purpose unless the person making it is:
>
> (1) if a male, at least 21 years of age; or
>
> (2) if a female, at least 18 years of age—and, at the time of the executing or acknowledging it as provided by this chapter, of sound and disposing mind and capable of executing a valid deed or contract.

District of Columbia Code Title 21, Fiduciary Relations and the Mentally Ill, Chapter 15 Conservators, provides in pertinent part:

> § 21-1501. Appointment of conservators[2]
>
> When an adult residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness not amounting to unsoundness of mind, mental illness, as the latter term is defined by section 21-501, or physical incapacity, properly to care for his property, the United States District Court for the District of Columbia may, upon his petition or the sworn petition of one or more of his relatives or any other person or persons, appoint a fit person to be conservator of his property.

---

1 Hereinafter referred to as capacity clause.

2 Hereinafter referred to as appointment clause.

§ 21-1507. Lis pendens[3]

Upon the filing of a petition under this chapter, a certified copy of the petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator is appointed on the petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void.

STATEMENT OF FACTS

The following statement of facts is taken from the findings of fact below. (J.A. 9-13)

Mollie Roberts McGilton, the testator, is the aunt of Dorothy Rossi, caveator, and Earl Fletcher, defendant. For many years the testator lived with her brother in their home at 2226 M Street, N. W., in the District of Columbia. Defendant and his brother, C. Marvin Fletcher, visited the testator weekly for years with their mother, testator's sister, until 1956 when she died, and thereafter on their own.

On April 12, 1961 Mollie Roberts McGilton executed a will leaving her entire estate to her brother with the provision that in the event he should predecease her then the entire estate was to go to her nephews, C. Marvin Fletcher and Earl A. Fletcher. Her brother died on January 17, 1963. After his death but before his funeral, caveator, Dorothy Rossi, arrived at her Aunt Mollie's home for the first time in many many years. After the funeral, Earl Fletcher and Marvin Fletcher found it increasingly difficult, through no fault of their own, to visit their Aunt Mollie so as to care for her needs as they had done in the past. During this period, which was to last until June, 1963, the plaintiff Dorothy Rossi was with her Aunt Mollie in her Aunt Mollie's home practically every day.

---

[3] Hereinafter referred to as voiding clause.

On March 7, 1963, Mollie Roberts McGilton executed a will favoring Mrs. Rossi. Shortly after the execution of the March 7, 1963 will a petition for the appointment of a conservator for Mollie Roberts McGilton was drafted. This petition, although signed by Mollie Roberts McGilton, was prepared at the behest of the plaintiff, Dorothy Rossi. On March 14, 1963 the petition for the appointment of a conservator was filed and a member of the bar of this Court, Francis L. Young, Jr., was appointed guardian ad litem for Mollie Roberts McGilton. On April 8, 1963 the guardian ad litem filed his report in which he recommended that a conservator be appointed. He also recommended, however, that none of the relatives of the ward be appointed as that conservator. He did not seek the conservatorship for himself. Nevertheless on April 22, 1963 Francis L. Young, Jr., was appointed conservator of the estate of Mollie Roberts McGilton and directed to undertake an investigation to select and recommend some individual to be conservator of the person of Mollie Roberts McGilton. On May 29, 1963 the conservator filed his report relative to the selection and recommendation of a conservator and formally stated to the Court that there was no necessity for the appointment of a conservator of the person of Mollie Roberts McGilton. Therefore no one was appointed to be conservator of the person of the testatrix.

On July 11, 1963 the conservator petitioned this Court for authority to expend funds so that a copy of the petition for the appointment of a conservator and for the appointment of the guardian could be filed for record in the Office of the Recorder of Deeds pursuant to Section 21-507 (21-1507) District of Columbia Code. The Court granted the conservator's petition on that date and the copies were duly recorded.

Sometime in June 1963 the plaintiff, Dorothy Rossi, ceased seeing her aunt, Mollie Roberts McGilton. At about this same time Earl and Marvin Fletcher were again

able to visit their aunt on a weekly basis in order to care for her needs as had been their practice for the many years before. They continued to care for her until her death in June of 1967.

During June, July, and August, Mollie Roberts McGilton informed the conservator of her estate, Francis L. Young, Jr., that she wished to execute a new will. All of Mr. Young's conferences with respect to this will took place solely between Mrs. McGilton and Mr. Young with no one else present. Ultimately, Mrs. McGilton told Mr. Young precisely what it was she wished her will to say and Mr. Young drafted that will in accordance with her wishes. That which Mr. Young drafted was the paper writing that was to become the August 31, 1963 will.

On August 31, 1963, Mr. Young in the company of Mr. James Treese, another member of the bar of this Court, went to the home of Mollie Roberts McGilton where the paper writing drafted by Francis L. Young, Jr., in accordance with the wishes of Mollie Roberts McGilton was read by Mr. Young to Mollie Roberts McGilton. At that time Mr. Young asked question of Mollie Roberts McGilton designed to ascertain whether she had a full understanding of the business at hand; whether she had a recollection of the property which she intended to dispose and the persons to whom she meant to give it and the relative claims of the different persons who were or should have been the objects of her bounty. This was done principally for the benefit of Mr. Treese, since Mr. Young had been in the company of Mrs. McGilton at least twice a month since his first appointment as guardian for Mrs. McGilton and had discussed often and in detail what it was Mrs. McGilton wished to do with respect to her will. On this date, Mollie Roberts McGilton executed the will in question here before two witnesses, and those two witnesses witnessed the will in her presence and in the presence of one another.

The Court found as a fact that at the time of the execution of the August 31, 1963 will, the will in question here, Mollie Roberts McGilton possessed the requisite testamentary capacity to execute a will. (J.A. 13) The Court found as a fact that it was not until the fall of 1964 that Mollie Roberts McGilton began to deteriorate mentally. (J.A. 13) It was on October 12, 1964 that she was first seen by a psychiatrist who thereafter continued to see her from time to time until March of 1966 when she was admitted to St. Elizabeth's Hospital.

SUMMARY OF ARGUMENT

The conservators statute of the District of Columbia does not modify the law of testamentary capacity so as to exclude from those capable of making a will individuals of sound mind who require a conservator to preserve their estate. Congress did not intend such a result and the universal rule of jurisdictions with similar statutes is contrary to it. The clause of the statute which makes void all contracts and transfers of property by the ward does not encompass the execution of a will. Rather it is a remedial device to guarantee that one party, the conservator, speaks for the estate with respect to inter-vivos transfers.

ARGUMENT

I

INTRODUCTION

The right to make a will is of the highest order. As this Court stated in *Barbour* v. *Moore,* 4 App. D.C. 535, 547 (1894):

> The right of making a will and disposing of one's property as he pleases, even to gratify partialities or prejudices, and even to the exclusion of those of near and close blood connection with him, is among the dearest and most sacred rights of the citizen, secured by the law; and that right ought not to be impared or nullified, except upon the most substantial ground.

Against this background, caveator argues that Congress has enacted legislation which prohibits a certain class of adult citizens of the District of Columbia from executing a valid will—those for whom a conservator has been appointed pursuant to §§ 18-1501 to 18-1507 of the D. C. Code. Her argument is in the alternative: (1) The voiding clause of the conservators statute encompasses wills by a ward and operates by itself to render them invalid; or (2) The voiding clause together with the definition of testamentary capacity of § 18-102 D. C. Code operates to render wards incapable of executing wills.

II

THE CLAUSE OF THE CONSERVATORS STATUTE VOIDING CONTRACTS AND TRANSFERS OF REAL AND PERSONAL PROPERTY BY THE WARDS DOES NOT ENCOMPASS WILLS

That the conservators statute was not intended to apply to wills is clear from the plain words of this statute and its relation to the law of testamentary capacity. No reference to wills appears on the face of the statute. Its purpose, as succinctly stated in the legislative history, is "to provide for the appointment of conservators to conserve the assets of persons of advanced age or mental weakness not amounting to unsoundness of mind or physical incapacity." 97 Cong. Rec. 7076 (Remarks of Congressman Harris) In order to conserve assets, the proponents of this legislation needed a means of protecting against improvident inter-vivos transfers of property by contract or deed, whether the result of an individual's weakness or the product of sharp dealing. The solution to this problem was the voiding clause.

A. By Its Terms, the Voiding Clause Is Inapplicable to Wills

The voiding clause makes no reference to wills. It applies to "all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conserva-

torship." Caveator's convoluted reasoning that "transfer" here includes wills because this Court has interpreted the word "convey" in another statute to mean "transfer" which in turn encompassed disposition by wills is not persuasive. One reason is that a strict reading of the voiding clause makes it inapplicable by its terms to transfer by will. Transfer by will does not take effect until death and death terminates the conservatorship. Therefore, transfers by will are not void because they are not made "before the termination of the conservatorship."[4]

B. A Drastic Change in the Law of Testamentary Capacity May Not Be Presumed in the Absence of Specific Legislation

Moreover, when viewed from the perspective of the fundamental change which caveator's reading of the statute would make on the law of testamentary capacity, it is clear that had this been Congress' intent specific language to that effect would be in the statute. The appointment clause extends the statute's coverage to individuals who under long-standing laws of testamentary capacity are not incapable of executing a will. Advanced age or mental illness do not per se render one incapable.[5] "Physical incapacity," while of evidentiary value, standing alone does not negate mental capacity.[6] Finally "mental weakness not amounting to unsoundness of mind" includes precisely individuals, those of sound mind, who are by definition within the standard of testamentary capacity. In light of the importance of the right to make a will, it is fallacious to argue that Congress established whole new classes of persons who would be incapable of executing wills without specific reference.

To support her argument, caveator seizes upon a single sentence in a letter by Judge Schweinhaut urging passage

---

[4] *Stone* v. *Damon*, 12 Mass. 487 (1815).

[5] *Thompson* v. *Smith*, 70 App. D.C. 65, 103 F.2d 936 (1939).

[6] *Johnson* v. *Newton*, 58 App. D.C. 118, 25 F.2d 542 (1928).

of the conservator statute. The letter related a situation which the judge felt exemplified the need for this legislation. The situation involved an 88 year old lady who had fallen under the absolute domination of a roomer in her house. In addition to causing her to make several inter-vivos transfers to him, the man had her make a will favoring him. Because this example was cited in the legislative history of the statute, caveator concludes that Congress intended the statute to cover wills.

This conclusion is invalid because then existing testamentary law adequately dealt with the wills problem posed by Judge Schweinhaut's letter. If a person executes a will favoring an individual because he or she is completely dominated by that individual then that will may be contested on the ground that it was procured by undue influence. But what in most instances was beyond the protection of the court were inter-vivos transfers under the circumstances cited. Accordingly, a provision for conservatorships was necessary. To guarantee the effectiveness of the conservatorship, it was mandatory that only the conservator transact business. Thus it was provided that, by filing, the conservator gave public notice that henceforth the ward was incapable of contracting, and that he, the conservator, must be the bargaining party. Any contracts of the ward from the date of filing are a nullity. Absent the provision, the estate of the ward might waste away leaving nothing to devise and the ward would become a government dependent.

C. The Universal Rule Is That Voiding Clause Restrictions Apply Only to Inter-Vivos Transactions

It is significant that except for this single sentence and the convoluted word play set out above, caveator does not cite a single case to support her position. The reason is that none exist. The decisions interpreting similar statutes in other jurisdictions universally hold that voiding clause restrictions apply only to inter-vivos transactions

and not to wills.[7] Even a statute which made void the making of "any instrument in writing" was held not to apply to wills, *Skelton* v. *Davis*, 133 So.2d 432 (Fla. App. 1961). The holding of the court in *Tucker* v. *Jollay*, 43 Tenn. App. 655, 311 S.W.2d 324 (1957), is an appropriate summary of appellee's position as to the effect of the voiding clause of the conservator statute:

> Nothing in the act lays a restriction on the right to dispose of property by will. Its purpose was to provide a means of conserving the estate of persons unable to look after their own property due to a condition of physical or mental weakness. Such persons are not, per se, incapable of making a valid will and we cannot read into the act a provision making them so.

III

THE OPERATIVE LANGUAGE OF THE CAPACITY CLAUSE IS A TEST OF MENTAL CAPACITY AND DOES NOT COMBINE WITH THE VOIDING CLAUSE TO DENY TESTAMENTARY CAPACITY TO PERSONS POSSESSING THE REQUISITE MENTAL CAPACITY WHO ARE LEGALLY INCAPABLE OF EXECUTING CONTRACTS

Whether or not Congress intended the conservators statute to invalidate wills, caveator argues, the statute has this effect because of the particular statutory scheme in the District of Columbia. The capacity clause of the wills statute cited above provides that only people who are "of sound and disposing mind and capable of executing a valid deed or contract" may execute a will. Caveator contends

---

[7] *E.g.*, Re *Worrall's Estate*, 53 Cal. App.2d 243, 127 F.2d 593 (1942), *Skelton* v. *Davis*, 133 So.2d 432 (Fla. App. 1961); *Jenckes* v. *Probate Court*, 2 R.I. 255 (1852); *Tucker* v. *Jollay*, 43 Tenn. App. 655, 311 S.W.2d 324 (1957); *Bean's Estate*, 159 Wis. 67, 149 N.W. 745 (1914). See cases cited, Annot., 89 A.L.R.2d 1120, 1127-1130 (1963). At I Page on Wills, § 1242 p. 651, the author states:

> Appointment of a guardianship for an aged person which deprives testator of power to make contracts, except where necessary, and which makes void all gifts and sales does not necessarily deprive him of testamentary capacity.

Accord, Note, Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation, 18 Stan. L. Rev. 1119, 1136 (1966).

that since testator's contracts and deeds are void under the conservator statute, then as a matter of law she lacks testamentary capacity under the wills statute. However, the proper judicial construction of the voiding clause and the capacity clause is that the conservators statute, which Congress did not intend to affect testamentary capacity and which is universally held not to do so, does not incapacitate all wards because of unique language in the wills statute.

A. Judicial Construction Is Necessary

Caveator argues that there is no room for judicial construction because the plain meaning of the statutes renders the ward incapable of executing a valid will. The plain meaning doctrine, however, is limited by the rule that where ambiguity or absurd consequences result from the plain meaning, then judicial construction is necessary. *District of Columbia National Bank* v. *District of Columbia*, 121 App. D.C. 196, 348 F.2d 808 (1965); *Whelan* v. *Welsh*, 50 App. D.C. 173, 269 F. 689 (1921). Both ambiguity and absurd consequences are present here.

Ambiguity can result from an inconsistency between two provisions. *Clayton* v. *Colorado*, 51 F.2d 977 (10th Cir. 1937). Here, there is a basic inconsistency between the standard for application for the conservators statute and standard for capacity to make a will. The application clause of the conservator statute expressly extends to persons of "mental weakness not amounting to unsoundness of mind." The capacity section of the wills statute, on the other hand, expressly empowers these same persons, those of sound mind, to make a will. Caveator resolves this inconsistency by arguing that the plain meaning of the statutes is that the voiding clause operates to render a nullity the wills of classes of people with sound minds. This inconsistency demonstrates that the purpose and history of each clause must be analyzed to determine if they were intended to have this effect.

The need for judicial construction is further demonstrated by the absurd consequences which would result from accepting caveator's argument. The conservators statute may be invoked in instances of solely physical incapacity. Thus, individuals with perfectly alert and sound minds yet with a disabling physical condition, a quadraplegic for example, might well require a conservator. If his conservator complied with the statute with respect to filing, then under caveator's argument the quadraplegic in perfect mental condition would be precluded as a matter of law from ever executing a valid will. His cherished right of disposition by will would thereby be destroyed by reason of his physical malady and a supposedly remedial act of Congress. This result, it is submitted, is absurd and an injustice to both the individual and to the intent of Congress in enacting the conservator statute.

B. Congress Did Not Intend a Conservatorship Adjudication To Bar Subsequent Executions of Wills by Wards

The court must construe the two sections to give effect to Congress' intent in passing the conservators statute, which as discussed above, was to conserve estates of a ward from improvident inter-vivos transfers. As a guide to the court in its construction, the universal rule in other jurisdictions is that a conservatorship adjudication does not per se nullify testamentary capacity.[8] Professor Milton

---

[8] *E.g.*, Re *Worrall's Estate*, 53 Cal. App.2d 243, 127 P.2d 593 (1942); *Skelton* v. *Davis*, 133 So.2d 432, 89 A.L.R.2d 1114 (Fla. App. 1961); Re *Lunalilo*, 3 Hawaii 519 (1874); *Harrison* v. *Bishop*, 131 Ind. 161, 30 N.E. 1069 (1892); *Stone* v. *Damon*, 12 Mass. 487 (1815); *Rice* v. *Rice*, 50 Mich. 448, 15 N.W. 545 (1883); *Lewis* v. *Jones*, 50 Barb. 645 (1868); *Jenckes* v. *Probate Court*, 2 R.I. 255 (1852); *Tate* v. *Chumbley*, 190 Va. 480, 57 S.E.2d 151 (1950). See Annot., 89 A.L.R.2d 1120, 1122-27 (1963), which cites cases from 31 jurisdictions plus England and Canada and states:

> All of the cases found (with the exception of a few older decisions which have been effectively overruled) follow the general rule that one otherwise of testamentary capacity may make a valid will, regardless of the fact that he is under guardianship, that is, that the mere existence of a guardianship at the time the will was executed does not require the conclusion that the will is invalid.

Id. at 1122. See, 57 Am. Jur. Wills § 55.

Green has offered several reasons for the rule. Green, The Operative Effect of Mental Incompetency on Agreements and Wills, 21 Texas L. Rev. 554, 585 (1943). First, the adjudication under a conservator statute is not of testamentary capacity but rather of competency to handle one's affairs during life. Also, only competency at a given moment is adjudicated. Finally, voiding clauses are designed solely to assist the conservator, to guarantee that he alone will handle the ward's property. This consideration is not relevant to testamentary dispositions which the conservator cannot make for the ward and which do not take effect until death when the conservatorship has been terminated. An additional reason which compels the conclusion that the District's conservator's statute does not render wills void is its application to cases which do not involve mental weakness but only physical disability.

The experience of the Florida Court of Appeals when confronted with a case strikingly similar to the present one is noteworthy. In *Skelton* v. *Davis*, 133 So.2d 432 (1961), the testator was placed in a conservatorship largely through the efforts of two of her six children. About five months prior to the conservatorship proceedings, testator had executed a will which divided her estate equally among the six children. Eleven days after the decree making her a ward was entered, the testator executed a new will which in effect disinherited the two children who had been instrumental in having her declared a ward. The lower court found that the testator possessed the requisite intent. But the Florida conservatorship statute provided in part that:

> "From and after the rendition of the decree appointing a curator, such person for whom appointed shall be a ward of the court appointing such curator, and the ward shall be wholly incapable of making any contract or gift whatever, or any instrument in writing, of legal force and effect, except after leave of court is granted upon a hearing after notice to the curator and such next of kin as the court shall order given

> notice of application." § 747.11, Fla. Stat. FSA, 133 So.2d at 435.

The requirements of this provision had not been met so that if it applied to wills the second will was invalid as a matter of law. The appellees in *Skelton* contended that to interpret the conservatorship provision as covering wills would conflict with the testamentary capacity provision.

The path the court followed in construing the two provisions is important.

> "The task of statutory construction is not an easy one. Care must be taken to avoid applying a literal interpretation with the result that seemingly unaffected provisions of unrelated chapters will be changed. While the language of section 747.11 is broad, it is important to note that no reference is made to section 731.04, which was already enacted into law. The particularities of the 'sound mind' requirement as propounded by section 731.04 and as judicially interpreted, are well established in this state. Any legislative change in this respect would be substantial and undoubtedly would be accomplished by express statutory language and not by means of implication." *Id.* at 436.

After noting that Florida's conservatorship statute can apply to persons who are only physically disabled, the Court held:

> Clearly physical incapacity is not an element of whether one is possessed of a sound mind and consequently, the test for appointment of a curator under section 747.05 is not to be regarded as the equivalent of a finding by the court that the person does not possess a sound mind. To hold otherwise, would result in the application of loose judicial construction by means of implication which both the language of the statute and the reason for its enactment do not call for. *Id.* at 437.

The statutory scheme of the District of Columbia is practically identical with that of Florida.[9] The factors significant to the court in *Skelton* are present here—lack of specific reference in the conservatorship statute to the wills statute and a conservatorship statute which can apply in cases of physical disability. Therefore, this court should conclude similarly that a conservatorship adjudication does not per se deprive a ward of testamentary capacity.

C. The Capacity Clause Is a Test of Mental Capacity

The history and prior judicial interpretation of the capacity clause is pertinent to this court's construction of the statutes. The capacity clause was adopted from the Maryland Probate Act of 1798. Maryland and the District are unique in including within their definition of testamentary capacity the phrase "capable of executing a valid deed or contract." Courts of both jurisdictions have not interpreted the phrase as exclusion of classes of people but rather as a measure of mental capacity. In *Lyon* v. *Townsend*, 124 Md. 163, 91 Atl. 704 (1914), the court quoted with approval the explication of the phrase in the early case of *Davis* v. *Calvert*, et al., 5 Gill. and J. 269, 24 Am. Dec. 282:

> "The written law of this state furnished the rule by which the capacity of a testator is to be measured; and the inquiry must always be whether, at the time of executing or acknowledging the will or testament, he was capable of executing a valid deed or contract; that is, here, the standard by which the mental capacity of a testator is to be ascertained, and no inferior grade of intellect will suffice."

---

[9] Admittedly, Florida's requirements for testamentary capacity do not include the phrase "capable of executing a valid deed or contract." But for the reasons set out in part C, *infra*, the phrase is descriptive and serves to objectify the term "sound and disposing mind." It does not add an element but rather is a test of mental capacity.

This view has been followed by courts in the District of Columbia. *Stewart* v. *Elliot*, 2 MacKey 307 (1883); *Barbour* v. *Moore*, 4 App. D.C. 535 (1894). In *Thomas* v. *Young*, 57 App. D.C. 282, 22 F.2d 588 (1927), the court approved the following charge:

> "[A]s a matter of law . . . the expression 'sound and disposing mind capable of exercising a valid deed or contract,' when used with respect to an attempt to dispose of property by a last will and testament, means that the decedent must have had, at the time of the execution of the instrument, sufficient mental capacity to dispose of her property or estate with judgment and understanding, considering the nature and character of the estate as well as the relative claims of the different persons, who would be the natural objects of her bounty."

The requisite elements for sufficient mental capacity were articulated in *Barbour* v. *Moore*, 4 App. D.C. 535, 547 (1894):

> "To make a valid will it is not necessary that the testator should be endowed with a high order of intellect, or even an intellect measuring up to the ordinary standards of mankind. Nor is it necessary to the making of a valid will that the party should have a perfect memory, and that his mind should be wholly unimpaired by age, sickness, or other infirmities. If the party possess memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to whom he intends to give it, and the manner in which he wishes it applied by such person, and, generally, fully understands his purposes and the business he is engaged in, in so disposing of his property, he is, in contemplation of law, of sound and disposing mind."

The court has consistently adhered to this formulation. *E.g.*, *Thompson* v. *Smith*, 70 App. D.C. 65, 103 F.2d 936 (1939); *Lewis* v. *American Security and Trust Company*, 53 App. D.C. 258, 289 F.2d 916 (1923). Here, testator

was questioned as to each of these elements at the time she executed the will and the court found as a fact that she possessed them. (J.A. 12-13) The reason neither she nor any other ward under § 21-1507 is able to execute a valid deed or contract is not necessarily for want of mental capacity, and in this instance the court found as a fact that testator possessed the requisite testamentary capacity when she executed her will. (J.A. 13) Despite these particular findings of fact and the judicial interpretation of the capacity clause, caveator argues that the clause has in the past and does now deny the power to make a will to classes of persons possessing mental capacity who are disabled by law from executing valid deeds or contracts. The examples she cites are the common law disabilities of married women and slaves.

Certainly, the reasons for these disabilities do not represent high-water marks in the wisdom of Anglo-American jurisprudence. But even these reasons do not establish the principle for which caveator cites them. Married women and slaves were disabled because they lacked liberty and free will.[10] Married women in particular were disabled because of the doctrine of merger of identity by which the husband acquired the wife's chattels and the right to dispose of them.[11] It was felt that if the wife had the power to will or contract she might defeat her husband's rights. The disabilities prevented married women and slaves from executing either wills or contracts. But the conclusion to be drawn from these disabilities is not that married women and slaves were barred from executing wills because they were incapable of executing contracts; rather, it is that the same premises which barred them from enter-

---

[10] Reppy, The History of the Law of Wills and Testaments in England, 16 Geo. L.J. 210, 214 (1914), citing Blackstone, BL Comm., Chase's 3d ed. II., 596.

[11] Reppy, *supra* note 10 at 214.

ing contracts also barred them from executing wills.[12] In 1951, Congress did not, as caveator contends, establish a new class of disability, like coverture and slavery, by enacting the conservators statute. The reason for the voiding clause in no way compels testamentary incapacity and was not intended to do so. It was a remedial device to effectuate the conservatorship.

D. Caveator's Contention Is Contrary to the Public's Interest and Unreasonable in Light of the Facts

Not only is caveator's contention not mandated by the scope of the conservators statute or the history of the capacity clause, but to adopt it would permit abuse of the same character as that which the conservatorship is designed to prevent. A designing person who was able to obtain a will favorable to themselves might then obtain testator's consent to a conservatorship. After filing, the ward-testator who belatedly recognizes his beneficiary's motive is legally barred from the natural step of changing her will. Moreover, the ward-testator would have to overcome considerable obstacles to return to testamentary capacity.

The facts of the instant case illustrate the sound basis for the rule that a conservatorship adjudication does not nullify testamentary intent. The defendant and his brother were natural objects of their aunt's testamentary generosity. They cared for her for years both before and after the appointment of a conservator for her. Shortly before the appointment of the conservator, which came at the behest of caveator, the testator executed a new will which favored the caveator. Testator's original will had favored the defendant. In the months which followed the appointment, testator, independently and apparently with good

---

[12] It is significant that caveator does not cite a single case for the proposition that married women and slaves were unable to execute wills *because* they were unable to execute contracts.

reason, expressed to her conservator a desire to execute a new will. Her conservator, who felt she possessed testamentary capacity, prepared the new will which is the subject of this contest in accordance with her express wishes. Thus, the will was executed by a person who was found to possess the requisite testamentary intent with the active cooperation of the conservator of her estate.

CONCLUSION

It has been said that the right of testamentary disposition "should not be struck down except for the most pressing reasons of public policy". Note, Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation, 18 Stan. L. Rev. 1119, 1124 (1966). Congress had no intention of drastically altering the law of testamentary capacity by enacting the conservators statute. Neither the words of the statute nor its purpose encompass dispositions by will. No compelling reasons of public policy have been cited by caveator to sustain her position. On the contrary, the public's interest is best served by the rule that a conservatorship adjudication does not per se invalidate testamentary capacity. Thus, it is submitted, this court should resolve the ambiguity created by the provisions of the voiding clause and the capacity clause in favor of the

intent of Congress and the unbroken chain of authority in other jurisdictions and affirm the decision of the District Court.

JEREMIAH C. COLLINS
WILLIAM E. MCDANIELS
1000 Hill Building
Washington, D. C. 20006
Attorneys for Appellee

Of Counsel:

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,270

DOROTHY H. ROSSI,

Appellant

v.

EARL A. FLETCHER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

WILLIAM D. DONNELLY
919 Eighteenth Street, N. W.
Washington, D. C. 20006
Counsel for Appellant

INDEX

CITATIONS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 22,270

DOROTHY H. ROSSI,

Appellant,

v.

EARL A. FLETCHER,

Appellee.

REPLY BRIEF FOR APPELLANT

In limine, it is important to note that the appellee's statement of facts occludes true chronology. As stated by appellee (Br., pp. 4-5), the conservator petitioned the Court on July 11, 1963, for authority to expend funds for recording the petition in the Office of the Recorder of Deeds pursuant to Section 21-507, D. C. Code (1961) but the conservator had in fact already recorded the petition more than one month earlier on June 6, 1963 (Appellant Br., p. 11, fn. 1).

I.

> The voiding clause of the conservatorship statute must rightly be read to encompass wills when regard is had for its legislative history and the prior decision of this Court.

Appellee's purported quotation from the Congressional Record as showing the purpose of the statute (Appellee Br., p. 8), misleads in that it omits a comma after "mind" and before "or physical incapacity" in what is really the title of the Bill as passed in the Senate (see Appellant's Br. App'x., pp. 1, 15-16).

Argument that the voiding clause of the conservatorship statute, standing alone, does not embrace wills (Appellee

Br., p. 8) is grounded on appellee's attempt to substitute his own narrow view as to the scope of the law in lieu of the broad sweep that legislative history shows Congress had in mind. Nowhere is this more obvious than in appellee's opening arbitrary assertion (Appellee Br., p. 8):

> In order to conserve assets, the proponents of this legislation needed a means of protecting against improvident inter vivos transfer of property by contract or deed, whether the result of individual's weakness or the product of sharp dealing.

Having this begged the question, appellee adds (Appellee Br., p. 9):

> The solution to this problem was the voiding clause.

Actually, as more fully shown in our main brief, the purpose of the legislation was to protect the assets of the individual, not only for his benefit, but, as well, for the benefit of the members of his family who were the natural objects of his bounty. To narrow the legislative target to "improvident inter vivos transfers" as appellee seeks to do (Appellee Br., pp. 8-9) unjustifiably narrows the manifest legislative intention to protect against improvident wills (Appellant Br., pp. 15-17, 18) and against waste that would subject the ward's family to want (Appellant Br., pp. 19-20). The argument of appellee requires disregard of the change in the

language accomplished by the House amendments. As initially passed by the Senate, the bill provided that upon appointment of a conservator, and without more--

> all contracts and business transactions, subsequent to the filing of the petition . . . shall be presumed to be a fraud upon him and against his rights and interests. (See Appellant Br., pp. 14-15, App'x., p. 7.)

As amended in the House and enacted, the invalidating or voiding effect occurs only upon completion of a second step, the filing for recording with the Recorder of Deeds, but once that second step is taken--

> all contracts, except for necessaries, and all transfers of real and personal property made by the ward . . . are void.

A. <u>The terms of the voiding clause of the conservatorship statute are broad enough to embrace wills</u>.

It is submitted that this Court's reasoning in the <u>Freitag</u> case (Appellant Br., p. 12) is not convoluted; neither is the conclusion that "transfer" includes a will other than a corollary of the <u>Freitag</u> holding. Appellee suggests (Appellee Br., p. 9) that a transfer by will does not take effect until death and is therefore not a transfer "before the termination of the conservatorship." Under this reasoning a deed of a recorded ward, subject to a life estate in grantor would also be beyond the voiding effect

of the conservatorship statute. For the future estate arises only upon the grantor's death under the Statute of Uses, and thus takes effect only at death of the grantor. Tiffany, Real Property (1912) Sec. 134.

Appellee also argues (Appellee Br., p. 9):

> One reason /appellant's argument is not persuasive/ is that a strict reading of the voiding clause makes it inapplicable by its terms to transfer by will. (Emphasis supplied.)

But remedial legislation such as is here involved is to be read liberally, not strictly (Appellant Br., p. 21). Appellee suggests no reason for regarding the statute as other than remedial.

B. Application of the conservatorship statute to wills involves no drastic change in the law of testamentary capacity.

After suggesting that none of the classes contemplated by the conservatorship statute are per se incapable of executing a will, appellee urges (Appellee Br., p. 10):

> In the light of the importance of the right to make a will it is fallacious to argue that Congress established whole new classes of persons who would be incapable of executing wills without specific reference.

The quick answer, of course, is that Congress did not purport to do so. The law merely provides that any person who deems it best, may, by recording the petition of one for whom

a conservator is appointed, destroy his legal competence to make a will until he proves his competence under section 4 of the law (Sec. 21-1504, D. C. Code (1967)). As to members of the class who are thus selected by the filing of the petition for record, appellee apparently concedes that they are barred from inter vivos contracts or transfers; but appellee advances no reason why the right to make a will is more sacrosanct or important to the individual than the right to make inter vivos transfers.

The Schweinhaut letter, effect of which appellee would minimize (Appellee Br., pp. 10-11) is important for two reasons. It undertakes to speak for all the judges as individuals (Appellant Br., pp. 16-17). Its detail, including reference to the improvident will, was brought before the House in debate (97 Cong. Rec. 7077; Appellant Br. App'x., p. 9). Appellee's suggestion that the wills problem was not presented because a will may be contested on the ground of undue influence is less than convincing when regard is had to established law. Inter vivos transfers, as well as wills, may be set aside for unsoundness of mind (as was attempted in the case instanced by Judge Schweinhaut)or because of undue influence (Towson v. Moore, 11 App. D.C. 377, 381 (1897): 5 Williston on Contracts (rev. ed.) Sec. 1625,

p. 4539). Difficulties of proof of undue influence in the case of wills is obviously greater, for the lips of the principal witness (the testator) are sealed. In re Lee's Estate, 80 Fed. Supp. 293, 294 (D.D.C. 1948). Where confidential relationship is involved, the burden of going forward with the evidence does not, in will cases, shift to the legatee as it does to the beneficiary where rescission action is brought on an inter vivos transaction. Tyson v. Tyson, 37 Md. 567, 583 (1873).

Appellee also argues that the voiding language of the statute was employed only because "it was mandatory that only the conservator transact business" (Appellee Br., p. 11). Legislative history refutes this contention. As it passed the Senate, and as reported favorably in the House, sec. 4 of the bill provided (97 Cong. Rec. 7076; Appellant Br. App'x., p. 8):

> The court shall have the same powers with respect to the property of any persons for whom a conservator has been appointed as it has with respect to the property of infants under guardianships.

Long before the O'Hara amendment, therefore, the bill as it had passed the Senate protected the conservator against improvident "sales" by a ward. For the powers of the Court with respect to property of infants under guardianship included the following (Sec. 21-305, D. C. Code (1961)):

> No sales of the property of infants . . . shall be made valid and effectual to pass title to the property sold until they have been reported to and ratified by the court. 1/

Section 6 of the Senate bill provided (97 Cong. Rec. 7076; Appellant Br. App'x., p. 8):

> Where a conservator is appointed pursuant to the provisions of this act, all contracts and business transactions, subsequent to the filing of the petition, of a person for whom a conservator has been appointed hereunder, shall be presumed to be a fraud upon him and against his rights and interests. (Emphasis supplied.)

It is thus evident that, so far as inter vivos transactions were concerned, the conservatorship bill, long before the House amendment that added the language with which we are concerned, was comprehensive enough to insure exclusive contracting and business transaction power in the conservator. Contrary to appellee's thesis, the language of Sec. 21-507, D. C. Code (1961) here involved, as added in the House was not needed to cover inter vivos transactions. Its much broader scope to cover "all transfers of real and personal property" must be given reasonable interpretation as embracing something other than the inter vivos transactions already

---

1/ This provision is presently codified as section 21-154, D. C. Code (1967):

> A sale of property of an infant is not effectual to pass title to the property sold until it is reported to and ratified by the Court.

embraced in the Senate bill, i.e., to include wills.

Appellee's argument, that the appointment clause that includes as potential wards for conservatorship persons unable by reason of "mental weakness not amounting to unsoundness of mind" bars the conclusion that the voiding clause operates as to wills, points up the significance of the more recent amendment of section 1 of the conservatorship statute. By Act of September 14, 1965, 79 Stat. 758, P.L. 89-183, there was added to section 1 of the conservatorship statute an additional class who are not so clearly possessed of testamentary capacity (sec. 21-1501, D. C. Code (1967)):

> When an adult residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness not amounting to unsoundness of mind, mental illness, as the latter term is defined by section 21-501, or physical incapacity, properly to care for his property, the United States District Court for the District of Columbia may . . . appoint a fit person to be conservator of his property.

The cited section 21-501, defines "mental illness" as "a psychosis or other disease which substantially impairs the mental health of a person." Appellee's argument that the appointment clause of section 1 of the conservatorship statute so plainly includes only individuals who are not incapable of executing a will (Appellee Br., p. 10) is no longer valid.

Formerly, adjudication of mental incompetency permitted appointment of a committee or trustee (D. C. Code 21-301 (1951) and (1961)). But now the statute provides (D. C. Code (1967) Sec. 21-564):

> (a) A patient hospitalized pursuant to this chapter may not, by reason of the hospitalization, be denied the right to dispose of property, execute instruments, make purchases, enter into contractual relationships, vote, and hold a driver's license, unless the patient has been adjudicated incompetent by a court of competent jurisdiction and has not been restored to legal capacity. . . .

But since such a patient suffering from mental illness may, as shown above, be made the subject of conservatorship, it follows that, upon filing of petition for record, such patient, as a ward, will lose not only his inter vivos rights but his power "to dispose of property" by will. Since the statute as to mental patients no longer contains provision for appointment of committees, it must be that the conservatorship proceeding was planned to take its place and to enable complete control of inter vivos and testamentary disposition by the mental patient.

C. Interpretations of other statutes in other jurisdictions and in other contexts are not persuasive.

Decisions in other jurisdictions under particular statutes of those jurisdictions (Appellee Br., pp. 11-12) are irrelevant. Here the Court has a legislative history peculiar

to the statute before it. Furthermore, the Court has already in the Freitag case, 47 App. D.C. 1 (1917) indicated that in remedial legislation wordage such as that here involved is to be given the broadest scope to encompass a will or devise within "conveyance" or "transfer."

II.

The wills statute sets up two tests:
Mental Capacity and Legal Capacity.

A. Appellee fails to show ambiguity.

Appellee recognizes, but fails, his first hurdle in attempting to show ambiguity. He attempts to create an ambiguity where there is none (Appellee Br., p. 14) by confusing section 1 of the conservatorship statute with section 7 of the same statute.

Section 1 (which lists the classes for whom conservators may be appointed) is what appellee calls the "application clause." It merely provides that a conservator may be appointed for an adult person if he is--

> unable, by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity properly to care for his property. . . (Sec. 21-501, D. C. Code (1961)).

Section 7 provides:

> Lis pendens: Upon the filing of a petition under this chapter, a certified copy of such

> petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator be appointed on such petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after such filing and before the termination of the conservatorship shall be void. (Sec. 21-507, D. C. Code (1961).)

The wills statute merely provides (Sec. 19-101, D. C. Code (1961)):

> No will . . . shall be good . . . for any purpose whatever unless the person making the same be . . . at the time of executing of acknowledging of . . . <u>of sound and disposing mind and capable of executing a valid deed or contract</u>. (Emphasis supplied.)

Appellee urges that there is an "inconsistency" as follows (Appellee Br., p. 14):

> The application clause of the conservator statute expressly extends to persons of 'mental weakness not amounting to unsoundness of mind.' The capacity section of the will statute, on the other hand, expressly empowers these same persons, those of sound mind, to make a will.

But where is the inconsistency? Section 1 (or the application clause) of the conservatorship statute bars none of the described classes from making a will; it merely permits or authorizes a conservator to be appointed for a member of any of said classes. Upon appointment of a conservator under what appellee calls the "application clause" the testamentary power of the ward remains competely unaffected. The wills statute says they may make a will; the application clause

does not purport to deny them the right to make a will. It says nothing about the subject. There is, it is submitted, plainly no inconsistency between the two sections. And there is clearly no ambiguity.

If, in the relatively rare situation, some interested person takes the second precautionary step of recording the petition with the Recorder of Deeds, and, if, as contemplated by section 7, a conservator is appointed, then the ward is, under the statute rendered incapable of executing a valid deed or contract for thereafter "all contracts except for necessaries, and all transfers of real and personal property made by the ward" are "void," under section 7 of the conservatorship statute. Still there is no inconsistency and no ambiguity.

If the ward whose petition has been recorded attempts to execute a will, it fails as such because it does not satisfy the requirement of the wills statute. He, under the conservatorship statute, is not "capable of executing a valid deed or contract," within the meaning of that phrase in the wills statute. What could be clearer? To this day, in proving a will, subscribing witnesses are required to make oath on a printed form that:

> . . . the Testatrix therein named signed said will in his presence; that said Testatrix published,

> pronounced and declared the same to be her last will and testament; that at the time of so doing said Testatrix was, to the best of affiant's apprehension, of sound and disposing mind, and capable of executing a valid deed or contract.

Appellee's argument as to inconsistency (Appellee Br., p. 14) is really an argument that the policy of the law is bad. He could, with equally strong ground, argue that the two statutes, when they operate together, nullify the wills of persons with sound minds and when the conservatorship statute alone is operative it nullifies the contracts and inter vivos transfers of people with sound minds. But the policy of legislation is not to be corrected by the Court short of constitutional barriers.

As showing "absurdity," the appellee instances a quadraplegic "in perfect mental condition" (Appellee Br., p. 15) and contends that appellant caveator could thus destroy his right of disposition by will. But any such abuse or absurdity is prevented by section 4 of the conservatorship law (Sec. 21-504 D. C. Code (1961); Sec. 21-1504 D. C. Code (1967)):

> When a person for whom a conservator has been appointed under this chapter becomes competent to manage his property, he may apply to the court to have the conservator dischaged and to be restored to the care and control of his property. If the court finds him to be competent, it shall enter an order restoring the care and control of his property to him . . .

The reason for the rule requiring ambiguity before the court may embark upon construction should not be overlooked. Certainty in the law is important. Laymen as well as attorneys are entitled to this certainty. Where the language is clear, men are entitled to act in reliance on the statutes. The two statutes, read together, and operating together have served to provide a safeguard the need for which has been aggravated by the increased use of homes for the aged financed in large part by county funds in the States and by Medicare. Experience of attorneys and hearsay among laymen have created a keen awareness of the hazards involved in leaving care of an aged person to a mental institution or nursing home. The instances are numerous in which a semi-senile, imbued with a keen appreciation of the care and personal favors extended by a nurse or nurses, without any undue influence, has sought to reciprocate by making large. inter vivos gifts or substantial testamentary dispositions that leave his immediate family almost destitute on his death. Up to now, it has been reasonable to counsel that a recording of the petition, after appointment of a conservator, will protect against any such improvidence by contract or will. Indeed, it seems probable that this was the very objective of the conservator in the instant case. In his report as

guardian ad litem, advising appointment of a conservator, he said of the then petitioning prospective ward (unprinted record):

> . . . she does not seem well oriented as to time, however, and is confused as to the chronology of recent events. She appears to be very gullible and trusting and to be very susceptible to the suggestion of anyone whom she feels is interested in her and trying to help her. . . .

The biggest objection to the operation of the conservatorship law and the wills statute together is that it could cut off much litigation that will make the legal profession that much the poorer. But this, again, is a question of legislative policy.

B. <u>It is irrelevant to argue that Congress did not intend, in passing the conservatorship statute, to bar subsequent executions of wills by wards</u>.

This argument merely takes the eye off the ball. The conservatorship statute does show plain intent to bar subsequent execution of contracts and transfers by wards as to whom imposition of the bar is initially deemed to be necessary. Congress did intend, in passing the wills statute 150 years ago, to bar execution of wills by persons lacking legal capacity under any other law.

Appellee argues that in other jurisdictions a "conservatorship adjudication does not per se nullify testamentary

capacity." But appellee's numerous citations to other jurisdictions (Appellee Br., pp. 16-18) are irrelevant. He concedes that the phrase "capable of executing a valid deed or contract" is peculiar to the statutory law of Maryland and the District (Appellee Br., p. 19).

The rest of appellee's argument under this head merely garbles the statutory provisions. Appointment of a conservator involves no adjudication of competence or incompetence. "Competency," under the statute is adjudicated only when the ward seeks to have the conservator discharged under section 4 of the law. It is not true that the voiding clause is designed solely to assist the conservator (Appellee Br., p. 16). On the contrary, as pointed out by Congressman O'Hara (97 Cong. Rec. 7079; Appellant Br. App'x., p. 11):

> It is immediately notice to anyone attempting to deal with the individual that he is under question as being a competent person. That, of course, would amount to public notice to anyone so attempting to take advantage of such an individual.

The argument of appellee based on the voiding of wills where there is mere physical incapacity establishes no more than that the statute is subject to abuse. But, if this does occur, it may be remedied by proceeding to discharge the conservator under section 4.

C. The requirement that the testator be capable of executing a valid deed or contract prescribes a test of legal capacity.

Appellee's argument (Appellee Br., pp. 19-21) justifies a recapitulation of established law.

1. The right to make a will is purely statutory. The statutes declare who may make a will and how it must be made to be valid as a will of lands. Johns v. Hodges, 62 Md. 525, 539 (1884).

2. After the feudal system abolished the right to devise land, the right was restored by the Statute of Wills (1540) 32 Hen. VIII, c. 1. Because there arose question as to whether the disability of coverture was by this statute removed by implication, the "Bill Concerning the Explanation of Wills" (1542-1543), 34 & 35 Hen. VIII, c. 51, was enacted specifically to provide:

> . . . that wills or testaments made of any manors, lands, tenements, or other hereditaments, by any woman covert, or person within the age of twenty-one years, idiot, or by any person de non sana memory, shall not be taken to be good or effectual in law.

(See Allison Reppy, The History of the Law of Wills and Testaments in England, 16 Geo. L. J. 194, 209, 213, 214).

3. Under the Statute of Wills and the 1542 explanation, it was generally recognized that there were three requirements:

Blackstone put it in the negative form as specific prohibitions:

(1) For want of sufficient discretion (idiots, lunatics, etc.).

(2) For want of liberty and free will (femes covert).

(3) On account of their criminal conduct.

(See Reppy, ubi supra.)

In 3 Washburn on Real Property (5th ed.) Book III, c. VI, it is stated (p. 544):

> The general qualifications of a testator or testatrix for making a good will are /1/ age, /2/ mental capacity and /3/ freedom from legal disability. The Statute of Wills excludes persons from making wills who are infants, femes covert, idiots and persons of non sana memory.

in 1 Jarman on Wills, 6th ed. (p. 54), it is said:

> No contract can enable a married woman to pass the legal interest in her lands at common law by an ordinary will; since being excepted out of the statute 34 & 35 Hen. 8, c. 5 (which exception is preserved by the 1 Vict. c. 26, s. 8) she was left subject to her pre-existing disabilities.

4. As noted in our main brief the common law, including the Statute of Wills (1540) and The Bill Comcerning the Explanation of Wills (1542) was superseded by the Maryland Act of 1798, often referred to as the Testamentary Law. Clawans v. Sheetz, 67 App. D.C. 366, 368, 369, 92 F. 2d 517 (Appellant Br., p. 28).

5. The report of Kilty (1811) shows conclusively his view that the phrase "capable of executing a valid deed or contract" was essential to disqualify married women as persons not capable of making a valid deed or contract since the old statutes of Henry VIII had been superseded. Kilty was Chancellor of Maryland from 1806 to 1821. See 1 Bland, frontispiece. Kilty's Report is regarded as authoritative. See introduction to Alexanders, British Statutes in Force.

6. It is true that with the abolition of slavery and the passage of Married Women's laws the "capable" clause was thereafter (and earlier) frequently cited as an additional test of mental capacity. But it has never been held confined to being a mere test of mental capacity as appellee would have it. No statute or law may rightly be regarded as repealed by desuetude.

Kilty's Report plainly establishes that "capable of making a valid deed or contract" refers to legal competency. Appellee has advanced nothing that disputes it.

D. <u>The facts of this case give no basis for appellee's argument that the statue is contrary to the interest of the public</u>.

The only unusual fact in this case is that the conservator, a lawyer, after going to the pains, purely on his own

initiative, and presumably because he believed it necessary for the protection of the assets of the testatrix, to file the petition for record so as to make the voiding section of the statute operative, within three months thereafter reverses his position and, without so much as formal obeisance to the provisions of the law he had invoked, himself undertook to assist the testatrix to execute a new will. Appellee is in no position to complain that the conservator's voluntary act, if given its plain legal effect, will bar the new will from probate.

Furthermore, if it were to develop that the statute was being abused as an attempted device to fix rights under a previously obtained will, there is a ready remedy. It was long ago recognized that when a woman incurred legal disability to make a will by her marriage, the marriage itself destroyed the ambulatory character of any pre-existing will and so caused it to cease to have the quality of a will for any purpose. Roane v. Hollingshead, 76 Md. 369, 370, 25 A. 307 (1892).

Conclusion

It is respectfully submitted that the decision of the court below should be reversed.

William D. Donnelly,
Attorney for Appellant.